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I.

The California penal statute enacts standards proscribing "obscene" and "indecent" books and writings which permit the abridgements of freedom of speech and press and the censorial proscription of thoughts, beliefs, ideas and opinions expressed in works of art and literature. The incomprehensible and indefinite provisions of the law permit retrospective conviction without rules or standards of guilt to guide an accused or a court and jury. The statute, on its face and as construed and applied to the appellant, deprives appellant of substantive and procedural due process of law, all contrary to the First Amendment and due process clause of the Fourteenth Amendment 21

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IN THE

Supreme Court of the United States

October Term, 1956

No. 61

DAVID S. ALBERTS,

Appellant,

vs.

STATE OF CALIFORNIA,

Respondent.

On Appeal From Judgment of Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

BRIEF FOR THE APPELLANT.

Opinion Below.

The opinion of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles and the Memorandum Opinion denying a rehearing [R. 19-23] are reported at 138 Cal. App. 2d. (Supp.) 909, 292 P. 2d 90. The Trial Court's oral statements in denying the motion to acquit [R. 80-93] and in rendering its verdict [R. 116-118] are not reported.

Jurisdiction.

Appellant appeals from the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles entered and

filed December 29, 1955 [R. 21-22], rehearing denied January 12, 1956 [R. 22-23]. Appellant was convicted on two counts of violating California Penal Code, Section 311, subds. 3 and 4 [R. 1-2, 5, 118] making it a crime, *inter alia,* to advertise or keep for sale *any book* which is obscene or indecent.

The constitutional validity of California Penal Code, Section 311, subds. 3 and 4 was drawn in question in the Statement on Appeal [R. 6-11] on the ground of its being repugnant to the First and Fourteenth Amendments to the United States Constitution and to Article I, Section 8, Clause 7 of the United States Constitution [R. 10]. The State Court in affirming the validity of California Penal Code, Section 311, as applied to appellant notwithstanding his assertion that it was repugnant to the United States Constitution said:

> 1. "The words 'obscene or indecent' as used in . . . section 311 are not unconstitutionally indefinite . . . To be sure, it is not always easy to decide on which side of the line a book should be placed . . ." [R. 20.]
>
> 2. "The circumstance that the defendant made use of the United States mails to advertise and to distribute his obscene wares . . . does not render the state statute (Section 311) inoperative." [R. 20-21.]

The Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles is the highest state court available to appellant. (Cal. Const., Art. VI, Sec. 5; *Edwards v. California,* 314 U. S. 160.)

Notice of appeal to this Court was filed in the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles on March 26, 1956. On April 11, 1956, appellant filed his Jurisdictional Statement, and by leave of Court he filed on January 10, 1957, a Further Memorandum. Probable jurisdiction was noted January 14, 1957 [R. 119]. This Court's jurisdiction to review the judgment is conferred by Title 28, United States Code, Section 1257, subd. 2. The following decisions sustain the jurisdiction of the Court to review the judgment on direct appeal in this case: *Butler v. Michigan*, No. 16, October Term, 1956; *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870; *Winters v. New York*, 337 U. S. 507; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282.

Statutes Involved.

The statute, the constitutionality of which was drawn in question, California Penal Code, Section 311, subds. 3 and 4, provides:

> "Every person who wilfully and lewdly, either:
>
> * * * * * * * *
>
> "3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or,
>
> "4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure; . . ."

is guilty of a misdemeanor punishable by fine and imprisonment.

The Trial Court [R. 83, 88, 98] and the Appellate Department [R. 20] relied upon *People v. Wepplo,* 78 Cal. App. 2d (Supp.) 959, 178 P. 2d 853 (1947), which is the only authoritative State interpretation of California Penal Code, Section 311. As interpreted, any book is obscene if it "has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire."

Appellant contends that this statute on its face, and as construed and applied, violates the First and Fourteenth Amendments to the United States Constitution. The First Amendment as applicable here provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . ."

The Fourteenth Amendment as applicable here provides:

> "No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statute was applied in this case to the *mailing* of circulars advertising books and keeping of books for sale *by mail.* This aspect of the case involves Article I, Section 8, Clause 7 of the Constitution of the United States, and Title 18, United States Code, Section 1461, and Title 39, United States Code, Section 259, subd. (a).

Article I, Section 8, Clause 7 of the Constitution provides:

> "The Congress shall have Power . . . To establish Post Offices and post Roads."

Title 18, United States Code, Section 1461, as here applicable provides:

Mailing obscene or crime-inciting matter.

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, devise, or substance; and

. . .

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or from whom, or by what means any of such mentioned matters, articles or things may be obtained or made, whether sealed or unsealed . . .

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisonment not more than five years, or both.

The term "indecent," as used in this section includes matter of a character tending to incite arson, murder, or assassination. As amended June 28, 1955, c. 190 §§1, 2, 69 Stat. 183.

Title 39, United States Code, Section 259a, provides:

Exclusion from mails of obscene, lewd, etc. articles, matters, devices, things, or substances.

Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempt-

ing to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Unlawful" plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

(b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order of such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, and the Postmaster General may provide by regulation for the return to the remitters of the sums named in such money orders or postal notes. Aug. 16, 1950, c. 721, 64 Stat. 451.

Questions Presented for Review.

1. Does the said California statute on its face and as construed and applied violate the appellant's rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States in that:

(A) Its provisions prohibit and punish the publication and distribution of books fairly within the area protected by the freedom of speech and press provisions of the Constitution, particularly when the legality of the book is measured by its effect upon the *thoughts* and *desires* of its readers.

(B) Its provisions are so elastic and far reaching as to encompass virtually all literature and art, thus giving censorial control of free expression to the trier of fact.

(C) Its provisions are so vague and indefinite that they fail to give adequate warning to those subject to its prohibitions as well as to provide proper standards for adjudication, particularly where, as in the case at bar, it is impossible to determine even after conviction and affirmance in the State courts in what particular appellant offended the law.

2. Does the said California statute as applied here to the mailing of circulars advertising books and the keeping of books for sale by mail violate Article I, Section 8, Clause 7 of the United States Constitution and infringe unlawfully on a sphere of activity reserved exclusively to the Federal government, respecting which the Federal government has fully legislated, preempting the field?

Statement of the Case.

On June 10, 1955, appellant was found guilty on Counts I and II of a four count complaint [R. 5, 118] which charged him, *inter alia,* with (I) keeping for sale and (II) advertising obscene or indecent books in violation of California Penal Code, Section 311, subds. 3 and 4. He was placed on summary probation for two years on condition that he not violate California Penal Code, Section 311, or have in his possession any obscene or indecent literature or pictures, and on the further condition that he serve sixty days in the County Jail and pay a fine of $500.00 [R. 5].

The case against appellant consisted simply of proving that he mailed [R. 47-48, 107-109] advertising brochures [Ex. 2, R. 26; Ex. 3, R. 27; Ex. 8, R. 32], and kept merchandise in his warehouse to fill by mail the orders received by mail [R. 101, 108, 110].

He was convicted on Count I for keeping (in his warehouse) books for sale by mail [R. 80-81]. He was convicted on Count II for mailing circulars advertising books [R. 80-81].

While pictures as well as books were introduced in evidence [Ex. 4, R. 27; Ex. 6, R. 28; Ex. 12, R. 38; Ex. 13, R. 39; Ex. 14, R. 39; Ex. 15, R. 40; Ex. 16, R. 40; Ex. 19, R. 53; Ex. 20, R. 53] the Appellate Department stated that its judgment affirming the conviction was based only upon a "keeping for sale" and "advertising" of *books* found to be "obscene and indecent." That Court said:

> "The defendant was convicted on two charges based on Section 311 of the Penal Code that he had lewdly kept for sale obscene and indecent books and

that he had lewdly written, composed and published an advertisement of them." [R. 19.]

Later the Court said:

> "Moreover, while the type of pleading being considered lends itself to an unfair prosecution, actually, in this case the defendant was not prejudiced; he would have been no better off had the charge been simply that he kept obscene books for sale." [R. 20.]

And finally the Court said:

> ". . . [T]hat some of the books were obscene we do not consider debatable." [R. 21.]

Prior to his arrest and on February 25, 1955, appellant was served with a search warrant and his business office and business warehouse as well as his residence were searched [R. 24, 35, 51-52]. The arresting officers seized and carried off as matters material to the arrest books, pictures and related matters to the number of "hundreds or possibly thousands" [R. 30-31] removing the items in "automobiles and a small truck" [R. 31].

The complaint was in the exact language of the statute [R. 3] and the charge against appellant was simply that in the matters seized he had somehow violated California Penal Code, Section 311, subds. 3 and 4. The offending books or other items were not identified. At the trial the District Attorney selected from the hundreds or thousands of items seized thirty-one books, ten magazines and a large number of pictures and introduced them in evidence together with three different mail order advertising circulars and mailing labels. The books introduced were introduced in groups, as collective exhibits, thirty-one books and ten magazines being offered under eight exhibit

numbers as follows: Exhibit 1 (11 books), Exhibit 5 (9 books), Exhibit 9 (5 books), Exhibit 10 (10 magazines), Exhibit 11 (1 book), Exhibit 21 (4 books), Exhibit 22 (1 book). These several books grouped by exhibit numbers were:

Exhibit 1: "Ballad of a Nun and Other Poems," "Homosexual Life," "Letters of the Courtesans," "How to be Married Though Happy or How to be Happy Though Married," "The Prostitute and Her Lover," "The Love Affair of a Priest and a Nun," "Amorous Tales of the Monks," "Wild Women of Broadway," "Strange Marriage Customs," "Confessions of a Minister's Daughter," "The Fleece of Gold."

Exhibit 5: "Petting as an Erotic Exercise," "Bestiality and the Law," "Male Homosexuals Tell Their Stories," "The Business Side of the Oldest Business," "Questions and Answers about Oragenital Contacts," "The Picture of Conjugal Love," "William Heirens—Notorious Sex Maniac," "Female Homosexuals—Lesbians Tell Their Stories," "Bestiality in Ancient and Modern Times."

Exhibit 9: "To Beg I am Ashamed," "Witch on Wheels," "The Pleasures of the Torture Chamber," "Snow Job," "She Made It Pay."

Exhibit 10: Ten different issues of "Good Times" magazine.

Exhibit 11: "Sword of Desire."

Exhibit 21: "Padlocks and Girdles of Chastity," "Straps and Stripes," "Memoirs of a Spankee," "Slaves of the Lash."

Exhibit 22: "Unique for Lovers of the Unusual."

The Trial Court stated and ruled that the books in Exhibit 1 were not obscene [R. 84]. The Trial Court further ruled that the books and magazines in Exhibits 10, 21 and 22 would not be considered by him for the reason that they were not shown to have been kept for sale [R. 90, 92].

The Trial Court found obscenity in the books in Exhibit 9 [R. 88-90] and Exhibit 11 [R. 90], although the Court did not read the books in their entirety [R. 88, 90]. In ruling that the books in Exhibits 9 and 11 were obscene, the Court pointed to what it believed was an excessive writing about "sex"[1] [R. 88-90]. Speaking of the book "Witch on Wheels," Exhibit 9 [R. 89], the Court said:

> "I assume that I could probably turn this book and open it at almost any page and find something which relates to sex in a manner which, in my opinion, is lewd and obscene."

Speaking of the book "Snow Job," Exhibit 9 [R. 89], the Court said:

> "And I suppose I can go through the rest of the book and continue to find references to sex, because that definitely seems to be what it is for."

Discussing "She Made It Pay," Exhibit 9 [R. 90], the Court said:

> "This goes into a most vivid and lengthy description of conduct of a couple, a white boy and, I believe, a colored girl leading up to a most vivid climax."

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[1]On three different occasions the Trial Court expressed the view that unless a person had a "reason" to read about sex it was "wrong" to do so [R. 86, 88, 93].

Discussing "Sword of Desire," Exhibit 11 [R. 90], the Court said:

> "This book is about a psychiatrist who is using his ability in the touching of certain nerve centers, and so forth, to develop a sexual desire in any woman. Up to where I read he had used it twice. I did not go up beyond page 49."

On appeal appellant argued that he could not be convicted for the possession of the books in Exhibits 9 and 11 for the reason that they were not shown to have been kept for sale. Replying to this argument the respondent before the Appellate Department urged that affirmance could and should be placed on Exhibit 5 or some of the books therein notwithstanding that the Trial Court had found such books not to be obscene [R. 15]. At the request of the Appellate Department [R. 12] respondent furnished an analysis of the exhibits which included a classification of the exhibits between not obscene, moderately obscene, very obscene, heterosexually obscene and sado-masochistically obscene [R. 13-14]. In this analysis respondent listed three of the books in Exhibit 5 as being very obscene [R. 13], although, as we previously observed, the Trial Court found the books in this exhibit to be not obscene [R. 86-88]. Appellant argued that the Appellate Department could not properly affirm the conviction below upon evidence which the Trial Court found would not support a conviction [R. 15]. Pressed between the arguments of appellant and respondent the Appellate Department failed to designate which books were the basis of the conviction, merely stating that some of the books were obscene. Accordingly, appellant knows no more after trial and affirmance than he knew before as to which particular books offended the law.

ARGUMENT.

Summary of Argument.

1. In order to delimit the broad constitutional questions involved in this proceeding, it is important preliminarily to dispose of some subsidiary issues which will help to disclose what is and what is not involved in this case.

(a) The statute here is not a "conduct" statute like the one involved in *Chaplinsky v. New Hampshire*, 315 U. S. 568. It has not been construed narrowly against speech which directly provokes to a breach of the peace. Here the State has attempted to control thought alone, has fixed a standard which punishes any writing or circulation of a book which may arouse "sexually impure" thoughts and desires. The State has entered the domain of its citizens' privacy—their beliefs, thoughts, emotions and sensations.

(b) The question of censorship here should not be beclouded by arguments concerning the relative merits of "prior restraint" or "subsequent punishment." Freedom of the press from all governmental censorship, prior or subsequent, is the fundamental rule in our constitutional system. There are expressions of opinion which may be free from previous restraint, but punishable subsequently when merged with conduct. This statute, however, deals only with the communications of ideas from one person's mind to another person's mind.

(c) The question of "particular application" is also only a subsidiary issue here. The instant statute by the breadth of its construction sweeps within its ambit activities which constitute only the exercise of freedom of speech and press, and operates as a threat to these free-

doms by its very existence. The attempt, nevertheless, to equate the standard of the statute with "hard core" obscenity is equally invalid. The term is only reducible ultimately to but another ambiguous standard used by the State to restrict any expression in art or writing which officials may deem "obscene." History demonstrates that nothing is more uncertain than "hard core" obscenity, and the standard has been used to suppress social, political, religious and scientific ideas of the greatest utility to mankind.

(d) In the area of procedural due process, certain questions debated in *Winters* are not presented here. This is not a statute which punishes coercion and incitement to prescribed unlawful conduct, and the question is therefore not presented whether certain utterances may be constitutionally encompassed within such area of coercion and incitement. Nor is the question presented here merely one of legislative policy in drafting criminal legislation. This statute has the fatal defect of uncertainty in the terms of its condemnation, in the want of definiteness in what the law prohibits. The state of mind of a "normal sensual man" is not ascertainable, and comparison with the "conduct" of a "reasonable man" in negligence cases is untenable. The statute here is reminiscent of an alien doctrine that persons may be punished for "socially dangerous" conduct even without specific statute and by standards fixed retroactively only by a court or jury.

(e) Whether a statute could be more narrowly drawn, as suggested by Judge Frank and Judge Bok, or whether "mental obscenity" statutes are constitutionally permissible in any case, is also not in issue here in view of the breadth of construction of the present statute. The attack upon the constitutional validity of this statute is not a

defense of "licentiousness." The power of the State in the domain of public morals to regulate conduct which purposefully and coercively incites directly to the injury of members of society is not denied. This statute, however, is devoted solely to the restriction of books which stimulate ideas, thoughts and desires. Nothing in its "age" or its history can support the validity of such a statute, especially in the light of the decisions of this Court since 1925 construing the fundamental guarantees embodied in the First and Fourteenth Amendments.

2. With the issues thus delimited, it is important first to note how broad and vague and incomprehensible are the standards, "obscene or indecent," as construed by the court below. There are such variables to consider as the meaning of a "lascivious thought" or "lustful desire"; what book will stimulate such thought or desire; and when a reader becomes corrupt or depraved by having a "lascivious" thought or "lustful" desire.

The search for answers to these and related questions is fruitless by all conceivable tests ordinarily used to determine the meaning of a statute. The encyclopedias concede that the standard of "obscenity" is decidedly ambiguous. Dictionaries define the terms "lascivious" and "lustful" solely in tautological abstractions. The words appear to have as many constructions and applications as there are different languages, countries, communities, localities, mentalities, conceptions and temperaments.

Nothing in the common law or early colonial history suggests that the mere stimulation of erotic thoughts or desires by the reading of books was considered a punishable offense. The few English cases demonstrate that only impious libels—attacks upon religion—or conduct

which provoked a breach of the peace, came within the purview of the law. Hawkins in his *Pleas of the Crown* stated at the end of the eighteenth century that "a writing full of obscene ribaldry, without any kind of reflection upon anyone, is not punishable." The same view obtained in colonial America.

It was not until 1857 in England with the passage of Lord Campbell's Act that prosecutions against "obscene" literature began. Even here, no attempt to define "obscenity" was made in the law, the statute being simply proposed as a measure to prevent the corruption of the morals of youth. The law was hotly opposed as contrary to the law of the land. It was applied in *Regina v. Hicklin* against a religious tract. An "obscene" book was construed as having contents tending to deprave and corrupt "those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall." The *Hicklin* rule, essentially embodied in the statute here, was transported to the United States and inspired the federal Comstock Act and similar state statutes.

Judicial precedents also lend no meaningful concept to the terms "lascivious thoughts" or "lustful desire" in the obscenity statutes. The courts have made no attempt at definition, leaving the construction to the *ad hoc* judgment of courts and juries in particular cases. In the light of this Court's interpretations of the extensive meaning of freedom of speech and press, it is impossible to determine from "common understanding" or "precedents" what is encompassed by books which incite "lascivious thoughts" or arouse "lustful desire."

Nor is there any body of scientific knowledge which suggests an answer. There is no clinical evidence as to

what "obscene" books stimulate "sexually impure" thoughts or conduct. In fact, many studies in the field indicate that very little sex information or erotic response is obtained from books, as contrasted with a vast conglomeration of conditions, persons and things from which such information and response are derived. The matter is further complicated by the fact that many so-called "sexually impure" ideas and conduct, which books are supposed to stimulate, are all widely held or committed in society today without thought of condemnation.

The statute here, with its vague and unconfined standards, casts a net as broad as all books in circulation and all persons connected with books, leaving it to a jury to determine arbitrarily who has and who has not offended the law.

3. The crux of the issue here is the validity of such unconfined standard in relation to the essential freedoms which the First and Fourteenth Amendments were intended to protect from governmental intrusion. The standard in the statute, as construed, vests in the State the arbitrary power to suppress and punish any speech, art or thought deemed "obscene" by government. This is the essence of censorship in the realm of the intellect. This Court has uniformly stricken down proscriptions or prohibitions against expressions of ideas when cast in vague, unconfined, censorial terms, no different in principle and substance to the characterization "inciting lascivious thoughts" or "arousing lustful desire."

History proves that within the compass and sweep of such undefined standards, speech, art and communication of the highest social significance, and clearly protected by the First Amendment, have been abridged and suppressed.

The *Index Librorum Prohibitorum* created by the standards of "obscenity" and "lasciviousness" includes virtually all of civilization's honor roll of art and literature. History confirms plainly, and tragically, that such unconfined standards will be inclusive of all works of art and literature. In the political, religious, social, economic, scientific and cultural areas, the sex aspects of life are necessarily fused with other critical aspects of life—if literature, art and thought are to be honest and creative. It is impossible to restrict one aspect without suppressing the other.

In repressing "obscene" literature and art, the censor succeeds only in suppressing much critical thought of great social value. Much political and social criticism has been suppressed as "obscene." Religious views have been extirpated because "heretical," "immoral" and "obscene." The early English "obscenity" cases were prosecutions against religious tracts critical of church abuses and practices. The Bible has been suppressed, even burned, on numerous occasions in order to prevent "corruptive" influence or to protect against "immorality." Critical scientific discussion in the area of sex relations has been suppressed as "obscene."

Since these vague standards do sweep within their terms broad areas of art, thought and speech undoubtedly protected from governmental infringement, the varied judicial attempts to save some books from proscription by reading "exceptions" into the law, which has not been done here, are essentially fruitless. Making "exceptions" leads to arbitrary choice of what is "good" or "bad." Neither "age," nor "artistic worth and skill," nor "sincerity of intent and purpose," can avoid the vice of this

totally all-inclusive and fatally vague prohibitory standard over speech and thought.

The separation of "good" books from "bad" books by the standard of "hard core obscenity" is equally untenable. Both as to conduct and expression, societies have been so varied as to what is "obscene" as to make it impossible to suggest that something disapprobated is nevertheless evil or wrong. What will arouse condemnation as "obscenity" or "indecency" with respect to conduct or expressions of the most open and intimate sexual nature, varies with race, time, place and circumstances. Sexual morality is a field upon which there are less final conclusions than any other. Suppression of voluntary writing or reading, without relation to unlawful conduct, under a standard of "hard core obscenity," can undermine the search for truth in an area where democratic solutions are vitally necessary for the health and welfare of society.

4. The suppression of all books which stimulate "lascivious thoughts" or "lustful desire" should be balanced against the devastating consequences to society from such vast inroads to freedom of speech and press. Once a standard is enforced as vague as the standard herein governing "obscene" or "indecent" publications, the most significant societal values are necessarily lost.

The censorship of books which allegedly stimulate "sexual impure" ideas is basically a desire to maintain the *status quo* in sex attitudes, while recognizing that different convictions, tastes and judgments exist. The attempt is to coerce unanimity of opinion by authority who assumedly has divined the "truth" concerning sex morality and attitudes. The result is only evasion and corruption of ideas and persons. The censor creates only fear and

self-censorship; places all ideas of social change in jeopardy by the cry of "obscene"; and destroys the opportunities for learning the truth in an area closely linked with the health and welfare of the community.

The broad interdiction of art and literature which is made possible here affects virtually the entire cultural, spiritual and intellectual life of the people. Art and literature are a reflection of society at any given time in all its manifold manifestations. They express an endless variety of opinions, and afford opportunities for private relaxation and contemplation, as well as opportunities for the search for truth, without which the pursuit of happiness is largely frustrated.

Finally, the suppression of writings because of their alleged stimulation to thoughts and desires does violence to the fundamental principles upon which the security of the Nation depends. Freedom of speech and press are not merely the means of permitting a dissident view to express itself; these freedoms are of intrinsic value to the whole of society as the best means of attaining progress in civilized life. The fear of unorthodoxy is incompatible with a strong democracy.

5. Appellant was convicted for mailing a brochure advertising obscene books and for keeping obscene books for sale. The Federal laws cover the entire field of "obscenity in the mails" and the State law, as applied here to appellant's mailing activities is void since it infringes on a sphere of activity reserved exclusively to the Federal government respecting which the Federal government has fully legislated.

I.

The California Penal Statute Enacts Standards Proscribing "Obscene" and "Indecent" Books and Writings Which Permit the Abridgement of Freedom of Speech and Press and the Censorial Proscription of Thoughts, Beliefs, Ideas and Opinions Expressed in Works of Art and Literature. The Incomprehensible and Indefinite Provisions of the Law Permit Retrospective Conviction Without Rules or Standards of Guilt to Guide an Accused or a Court and Jury. The Statute, on Its Face and as Construed and Applied to the Appellant, Deprives Appellant of Substantive and Procedural Due Process of Law, All Contrary to the First Amendment and Due Process Clause of the Fourteenth Amendment.

A. The Issues Within the Statute's General Frame of Reference.

We have divided the brief into two points. The first point here deals with all due process questions; the second point, with the issue of Federal preemption. Since "indefiniteness" is entwined with "free speech" in this case, we discuss both questions under the first point.

The first point is divided into four sections. The first section here is devoted to an analysis of the free speech and due process questions, in their broad aspect. The attempt is to delimit the issues, both as to what is and what is not involved in this case. The second section is concerned with the impossibility of identification of the words "obscene or indecent" in the light of the constitutional requirements of due process. The third section is devoted to the discussion of the fundamental issues

of censorship and freedom of speech and press. The fourth section describes the universal importance of the societal values of freedom of speech and individualism.

1. The Scope of the Statute.

(a) The statute applies to all writers, composers, printers, publishers, sellers, distributors, exhibitors, designers, painters and other persons similarly situated.

(b) The statute affects all writings, papers, books, pictures, prints and figures, and advertisements thereof.

(c) The focus of the statute is on the "reader." The crime is "mental obscenity." The issue is the effect of the book or other writing or art work upon the mind of the reader or viewer.

(d) The statute does not purport to limit the statute to any class of readers or viewers. It covers, therefore, all adults, "normal" or "abnormal"; all children, "well adjusted" or "delinquent."

In short, this statute within its terms is limitless in scope, both in operation and effect. It is probable that the State will concede that this extended coverage is precisely the purpose and intent of the "obscenity" statute.

2. The Object of the Statute.

The statute contains only one stated objective. As construed by the state court, the statute is concerned solely with the emanation and dissemination of books which have "a substantial tendency to deprave or corrupt [their]

readers by inciting lascivious thoughts or arousing lustful desire."[2]

It is important to emphasize that this is the sole stated objective of the statute. The statute does not purport to impose criminal sanctions for the writing or sale of books which cause the commission of crimes against persons, or which directly and purposefully incite thereto. Since incitement to criminal conduct is not the punishable offense under this statute, the question of the causal relation between the reading of books and the commission of acts in violation of the criminal code is not directly presented here, although we treat the matter in subsequent discussion.

The sole aim of the statute on its face, and as construed and applied by the court below, as aforestated, is to punish the inculcation of "lascivious thoughts and l. tful desire"—as thoughts and desires—in the minds of readers of books, papers, or other writings. The law stops at this point. The clear purpose, therefore, is the preservation and maintenance of "sexual purity" in the thoughts and desires of the members of the community. The State has undertaken to decide not only what shall constitute the "law-abiding citizen," but the "virtuous mind" as well.

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[2] ". . . the book is within the statute if it contains prohibited matter in such quantity or of such nature *as to flavor* the whole and impart to the whole *any of the qualities mentioned in the statute*, so that the book as a whole can fairly be described *by any of the adjectives or descriptive expressions contained in the statute*. The problem is to be solved, not by counting pages, but rather *by considering the impressions likely to be created.*" (*People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 962, 178 P. 2d 853 (1947) (emphasis supplied).)

3. THE CONSTITUTIONAL AND LEGAL QUESTIONS INVOLVED, AND THE SUBSIDIARY ISSUES RAISED THEREUNDER.

In broad contour, the issues raised here may be briefly stated: Does the statute, as construed and applied, abridge freedom of thought and expression to an extent forbidden by the provisions of the First and Fourteenth Amendments?[3] Do the standards set by the statute constitute a censorial proscription of ideas and speech, as violative of the constitutional provisions as the statutes invalidated by this Court in *Thornhill v. Alabama*, 310 U. S. 88, and *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870, to cite only two examples? Are the standards created by the statute so inherently meaningless as to offend the procedural due process provisions of the Fourteenth Amendment?

Questions such as the aforesaid reflect, however, deeper issues of constitutional importance. Each of these subsidiary issues, standing alone, may or may not be decisive for adjudication, but each is relevant for a delineation of the legal issues which a statute such as the one here involved creates.

(a) Legislation which sought to command adherence to a particular religious or moral tenet would appear to be constitutionally impermissible. The coercion of uniformity of sentiment, the prescription of what shall be orthodox in religion or morals as a means of "saving

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[3]It is not solely literature dealing with sex that the statute interdicts. It is any writing which stimulates "impure" sex thoughts and desires. Given the objective circumstances, a learned jurist believes that even the "Mechanic's Lien Act" may initiate a train of thought that the statute is intended to prevent. (*Commonwealth v. Gordon*, 66 D. & C. 101, 137 (Pa., 1949).)

souls" would invade "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." (*West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 640, 642.) If a State cannot commend adherence to a particular moral precept, can it nevertheless make the inculcation of any other moral tenet a penal standard with the risk of fine and imprisonment for disobedience? It is submitted that such indirect and subtle encroachment upon liberty of thought and intellect cannot be supported. The State does not appear to have power to command "sexual purity" in the minds of its citizens, nor, it is submitted, the power to interdict books voluntarily read by citizens which may arouse anything but "sexually pure" thoughts and desires. In the area of sex thoughts and desires, citizens should have the right to be their own private selves and to be let alone.[4] We speak here of this statute, a statute for adults.

On the other hand, a different question of "state power" is presented in such cases as those typified by *Chaplinsky v. New Hampshire*, 315 U. S. 568. There the statute, narrowly construed by the state court, was limited to conduct which directly provoked the person against whom it was directed to acts of violence. It was specifically

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[4] "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." (Brandeis, J. in *Olmstead v. United States*, 277 U. S. 438, 478.)

held that the word "offensive" in the statute was "not to be defined in terms of what a particular addressee thinks." (*Supra*, at 573.) The words in the statute were construed to apply to "disorderly words, including profanity, obscenity and threats" which had the characteristic of "plainly tending to excite the addressee to a breach of the peace." (*Supra*, at 573.) There is a vast constitutional abyss between conduct which immedately incites to a breach of the peace or the commission of crimes, and writing or communication which does no more than incite thoughts and arouse desires. Moreover, it is one thing to say that nobody should force disorderly words or conduct upon an unwilling recipient, to the latter's injury and outrage. It is quite another thing to say that an utterance cannot be communicated to recipients willing to receive and think about it. The reading of books is voluntary.

(b) Another broad issue which appears to intrude into the confines of the discussion here is the question of "prior restraint" vs. "subsequent punishment." Is the distinction of constitutional significance in a consideration of the validity of an "obscenity" statute as construed herein? Put another way, if the State may not validly restrain initially the communication of an idea which "incites to lascivious thoughts and arouses lustful desire," may it nevertheless punish all connected with the idea after the idea has been communicated—and this, although the idea in its outermost boundaries has gone no further than the mind of another? It is submitted that any attempt to draw distinctions in the aforesaid limited area rests upon a basic misconception of the historical, social and legal concepts of censorship.

Censorship is a conscious policy of restricting the public expression of ideas. It is aimed at restricting their being even mentally entertained. It may be exercised by the political or by the religious authorities, or even by private groups. The scope and method of censorship may vary, but its principal purpose is always allegedly to protect the governing authority or the social or moral order which authority considers itself bound to protect.

> "Censorship may take the form of an examination of material in advance of publication and its suppression if disapproved. This is known as preventive censorship, in contrast to punitive censorship, which inflicts penalties after the offense and seeks to destroy the offending material. The censorship of antiquity was punitive, while that of the mediaeval church and of early modern times was in general preventive." (Harold D. Lasswell, III *Cyc. of Soc. Sci.* 292.)

In England, during the seventeenth century, as Blackstone informs us, the government there abandoned the preventive censorship of printing and began the punitive. But that form of censorship was not made a part of the American governmental system.

> "The protection of the First Amendment, mirrored in the Fourteenth, is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication." (*Chaplinsky v. New Hampshire*, 315 U. S. 568, 572, n. 3.)

> "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." (*West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 641.)

To paraphrase what this Court has stated at different times, the very purpose of the First Amendment was to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech and religion; it rests on the assumption that the widest possible dissemination of information upon all subjects from diverse and antagonistic sources is essential to the welfare of the public. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets the United States apart from totalitarian regimes. The exercise of freedom of speech and of press lies at the foundation of free government by free men, since free discussion of the problems of society is a cardinal principle of Americanism, and the vitality of civil and political institutions in our society depends on such discussion.

Freedom from all governmental censorship, prior or subsequent, is therefore the fundamental rule in our constitutional system. Most censorship operates through the instrumentality of arbitrary and vague, indefinite standards prescribed by the Censor himself. This is the grossest vice. The Censor then has plenary power to determine "permissible" expression. Such power is denied under our law in all postures of the case and in all guises.

The confusion which sets in in this area, it is respectfully submitted, is the failure to distinguish between the right to exercise freedom of speech and press and the state's power to punish utterances which directly coerce and incite to acts injurious to other persons. Where the expression of ideas are involved, "previous restraint" is impermissible, but "subsequent punishment" for coercive incitement of unlawful acts may be imposed. This will

explain the seeming anomaly between provisions in state constitutions guaranteeing freedom of speech and press while holding persons responsible for "abuse" of that right, and Madison's statement with respect to the freedom of the press that

> "it has accordingly been decided, *by the practice of the states,* that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding the proper fruits." (*Report on the Virginia Resolutions* in 4 Elliot's Debates 571.) (Emphasis supplied.)

The statute here is not a "conduct" statute. It is a statute which avowedly deals only with the communication of ideas from one person's mind to another person's mind. The issue here is whether the statute is a censorship statute. Appellant submits that the determination of the validity of the statute cannot be beclouded by arguments concerning the relative merits of "preventive" censorship as contrasted with "punitive" censorship. Freedom cannot be indivisible if censorship is divisible. For the aforesaid reasons, we devote our discussion in a subsequent section of this brief principally to the basic issue of whether the statute here permits the arbitrary control by government of ideas and their expression contrary to the essential purposes of the First and Fourteenth Amendments to the Constitution.

(c) We turn now to another issue lying beneath the broad constitutional questions presented here. That issue revolves around the constitutional protection afforded to utterances which are allegedly "no essential part of any exposition of ideas" or of ideas that are assumedly "of

slight social value as a step to truth." Since these are the labels normally attached to "lascivious thoughts and lustful desire," we treat the matter fully in our subsequent discussion of the free speech and press aspects of the statute herein. Some general considerations may be noted here.

In the first place, it has been held by this Court in a number of cases[5] that a statute is void on its face, irrespective of its application in a particular case, where it does not aim specifically at evils within the allowable areas of state control, but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press, and hence operates as an overhanging threat to free discussion. A statute is invalid on its face if it is so vague and indefinite as to permit the punishment of the fair use of the right of free speech, or where the sweeping and inexact terms of the statute disclose a threat to freedom of speech inherent in its existence. In other words, a positive law which can be used by officials of government to abridge freedom of speech and press does not avoid the condemnation of the Constitution because the statute might only be used in cases where speech is assumedly not protected. A contrary rule would open the doors wide for the suppression of ideas because of the overhanging threat of arbitrary governmental action.

It is appellant's position that the statute here is plainly violative of the above principles and is no different in essence and character from the statutes previously invali-

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[5]See, *Thornhill v. Alabama*, 310 U. S. 88; *Bridges v. California*, 314 U. S. 252; *Stromberg v. California*, 283 U. S. 359; *Herndon v. Lowry*, 301 U. S. 242; *Carlson v. California*, 310 U. S. 106.

dated by this Court as aforementioned. The statute, as we shall endeavor to demonstrate, is so broad in scope as to permit a limitless inhibition of speech and press. Consequently, we do not actually reach the question of "particular application."[6]

Nevertheless, it is relevant to our discussion of free speech and censorship in relation to the "obscenity" statute here to treat the question of the power of government in the "hard core" area of ideas allegedly containing "slight social value." We consider the "hard core" argument in the field of "obscenity," with all due deference to those who press it, as reducible ultimately to but another ambiguous standard working similar ambiguous abridgement of speech and press. It is an epithetical argument, an argument which proceeds by "knowing look" and "sly wink" to assert that "we are all certain" that there are some "obscene and indecent" books which are worthy of the bonfire only.

The denotation of "hard core obscenity" requires answer to two questions: Who says so? How can you be "certain" that the particular utterances are "hard core obscenities" with no value to society? It is, of course, commonplace, that in the realm of discussion between citizens, "the tenets of one man may seem the rankest error to his neighbor." (*Cantwell v. Connecticut*, 310 U. S. 296, 310.) Argument and debate may include exaggeration and vilification. Thus, it is possible that an idea may be ter[illegible]d

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[6]There is, however, no concession here that the writings which resulted in the conviction of appellant were "obscene and indecent" as defined by the court below. The appellant continues to assert that all the literature used at the trial against him was protected from governmental interdiction by the provisions of the First and Fourteenth Amendments.

"obscene" or "hateful" or "distasteful" as it seeks acceptance in the marketplace of ideas. This is the gamut which the idea must regrettably run, and so long as the people themselves are debating the matter and deciding the issue, the idea must accept the brickbats as well as the accolades.

A quite different situation is presented when the government enters the arena of debate and silences the utterance because it is "obscene." Citizens can no longer determine for themselves whether their own ideas of morality are valid, or merely the result of prejudice. They can no longer distinguish between truth and falsity, nor synthesize the best of their own ideas with the best of others. They are no longer adults in a self-governing society, but infants whom the government is afraid to trust. Imitation and conformity replace spontaneity and diversity.

That is why in the area of "hard core obscenity" it is important first to determine who is making the decision and how it is being made. The State's power only begins when the idea directly coerces conduct which immediately injures others in the community. It is not the function of the State to punish the incitation of *thoughts* or the arousal of *desires*, be those thoughts or desires denominated "bad," "hateful," "lascivious," "lustful" or whatever. So long as the idea does not advocate or incite to acts of wrongdoing, so long as its recipients are free to accept or reject it, so long as the idea remains depictive, expositive, discursive, or representational, so long as the idea remains subject to the cogitation of the mind, it is free from governmental power of abridgment—"hard core" or not. That at least has been the theory of our legal system since the colonists parted company with

King George and the "common law of England." The "law" in the United States is as indifferent to the subjects of writings as it is to the "flavor" of its contents.

> "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbors to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg." (Jefferson, *Notes on Virginia* in *Works* (Fed. Ed.), Vol. IV, 78.)[7]

How certain can we be that an idea has "no social value as a step to truth," that the idea is solely and truly "hard core obscenity?" Judge Hand once observed that "the spirit of liberty is the spirit which is not too sure that it is right," and stated on another occasion:

> "How tentative and provisional are our attainments, intellectual and moral; how often the deepest convictions of one generation are the rejects of the next . . ." (Quoted in Gellhorn, *Individual Freedom and Governmental Restraints* (1956), 180, n. 54.)

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[7]It is sometimes urged in support of these "obscene thoughts and lustful desire" statutes, that the writings, having succeeded in inculcating "bad" ideas, may prompt the readers to take unlawful action. Aside from the fact that the statute here does not even purport to make the resultant conduct an ingredient of the offense, there is a constitutional distinction between the utterances of ideas which may prompt readers to take unlawful action, and advocacy and incitement that such action be taken. (*Taylor v. Mississippi*, 319 U. S. 583.) The difference is between the exercise of reason before action is taken and unreasoned action compelled by coercion. There may be of course "psychopathic personalities" who have lost the power of reason and control of their conduct. A statute which limited the furnishing of books to such defined persons without a doctor's prescription might raise another question. That is not the statute here. It is doubtful that a free press can flourish when measured by the standards of a "sick mind".

Jefferson stated:

> "Subject opinion to coercion: whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons." (*Notes on Virginia, supra,* 79.)

The logic of history is that the most uncertain question in the world is whether an idea is "good" or "bad," whether it has "social value" or not. That is why there is so much danger to the public welfare in ticketing or labeling ideas as "very obscene," "moderately obscene," or even "pure."[8] The notion that the earth was not the center of the universe was "hard core obscenity" in Copernicus' time. Today we know that that was the "purest" of ideas and of inestimable value to the progress of civilization. Galileo thought the earth was round but very few persons in his time thought that such "madness" was a socially useful idea. It was not long ago that any discussion of the causes and cure of venereal diseases was stamped as blatant "obscenity" and men went to jail for expressing such ideas.

The fact is that too often the measure of what ideas are "socially useful" is based on the limits of one's own knowledge, one's own perceptions, senses, passions, prejudices or recollections. In every field, science as well as the arts and literature, men's minds are touched by what seems to some of them unknowable or untouchable, or which recalls to them what they would keep beyond recall. Ideas of great value, or crude ideas upon which others might later build significant contributions to mankind, are

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[8]See the prosecutor's "Analysis of Exhibits" below [R. 13-14], and the Answer to the Analysis [R. 14-18].

thus relegated to oblivion as "obscene" or "socially useless." The most "obscene" utterance may sometimes mirror the most significant social, scientific, political, economic, moral or aesthetic problem which cries for discussion.[9]

(d) There are also corollary issues in the field of procedural due process which require some prior analysis. This is a criminal statute we are discussing; not the "rewards of virtue" nor the "wages of sin." Citizens are being fined and imprisoned here under a purported law, and stamped with a stigma more difficult to erase than some of the most heinous offenses. The sanctions imposed by private organizations upon their members for violations of self-imposed "sex codes" are not in issue. We deal here solely with the attempt of a State in our constitutional system to impose criminal penalties upon those who write, sell and distribute books which engender "lascivious thoughts and lustful desire" in the minds of members of the community.

It is quite true that we argue issues of "indefiniteness" and "vagueness" here, both as a matter of procedural and substantive due process. But in a more profound sense, we urge that conviction here has been obtained under no "law" at all. What this purported statute does is to authorize the punishment of "socially undesirable conduct"

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[9] "For communities and cultures which project an ethic of racism as the necessary consequence of 'the laws of nature and of nature's God' censorship of the arts presents no ethical problem. If the arts communicate disapproval of racism, if they tend to reinforce deviations from racism intrinsic to 'public morals', then the censor must forbid and punish them. . . . To show that colored and white children could freely and happily play together is to be 'guilty of 'obscenity' and 'indecency'." Kallen, *The Ethical Aspects of Censorship* in 5 Social Meaning of Legal Concepts 34, 58 (1953), published by New York University School of Law.

by any measures which a court and jury may deem "good" or "proper." The first principles of legality are violated here. "The essence of this meaning of the principle of legality is limitation on penalization by officials, effected by the required prescription and application of *specific rules.*" Hall, *General Principles of Criminal Law* (1947), 19. The important signification of the principles of *nulla poena sine lege* and *nullum crimen sine lege* is manifested in the requirements that no person shall be punished except in pursuance of a statute which fixes a penalty for criminal conduct; that there be specific legal definition of criminal behavior and barring judicial expansion of the defined criminal behavior-circumstances; and that penal laws shall not be given retroactive effect. (Hall, *supra,* 19-32.) It is appellant's position that these principles are fundamentally violated here, and that he has been denied their equivalents embodied in the due process provisions of the Constitution.

(e) On the basis of the aforesaid, certain issues mooted in the *Winters'* majority and dissenting opinions do not appear apposite here. For example, this statute does not purport to punish incitement to *crime.* It reaches at most incitement to thoughts and desires. If a statute should punish incitement to acts and crimes, an issue might arise as to whether certain utterances are included within the proscribed area.

That is not the situation here. It is not conceded, and no one can seriously contend, that a State ordinarily—if indeed, ever—has the power to intrude into the subjective area of *thoughts* and *desires.* We do not begin here with a conceded power, but rather with the attempt of a State to carve out an area of control from a domain normally,

if not always, free from all governmental intrusion under the Constitution.[10] When the State makes such attempt, it is not a question of "policy" which is involved, but a question of "power." And before there can be any intelligent discussion of "power," there must first be at least a very clear delineation of the area which the State proposes to remove from constitutional protection—very clear, indeed. That has not been done in this case. There is simply no way of objectively determining what book under what circumstances will "incite lascivious thoughts and arouse lustful desire" in the "normal" reader, as distinguished from boredom, laughter, disgust, revulsion, pity, sorrow, disappointment, anger, elation, joy, etc., etc. We await with interest, moreover, respondent's view of what is a "lascivious thought" or a "lustful desire." Is it every thought of sex? Is it every thought of propagating the sexual act? Does it include every thought of the process of love, or "the ways of a man with a maid?" We are embarked here on an uncharted sea of subjective prejudice and idiosyncrasy, an insubstantial basis, it is submitted, for the State's claim to control an area ordinarily enjoying the protection of the Constitution. It is for these reasons we assert that the aforementioned "policy" question involved in *Winters* is not involved here. We add, of course, that if, as a matter of precedural due process, "lascivious thoughts" and "lustful desires" can

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[10] "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." (*Cantwell v. Connecticut*, 310 U. S. 296, 303.)

be isolated and defined, we would assert that such thoughts and desires are nevertheless free from interdiction by the State, as a matter of substantive due process.

(f) Another "policy" issue in the area of "indefiniteness" is not involved here, it is respectfully submitted. No question of "permissible uncertainty" arises. A State may wish to punish conduct marked by variations in human activity. Two recourses appear open: the State may specify each variety of the conduct sought to be punished, leaving to subsequent legislation other varieties which may appear; or it may choose to punish the form of conduct generally, deeming it within the province of "common knowledge" that the varieties of such misconduct are easily known and ascertainable. In the latter case, the citizen is left with the duty of "estimating rightly" that his own conduct may be encompassed by the statute. That there are danger to the liberty of a citizen in such general legislation, and opportunities for arbitrary governmental action, can hardly be denied. Still, it has been urged, that deference is due the legislature by the courts, at least to the extent of permitting the legislature to choose one "policy" or another of bill-drafting. It is customarily urged that in theory, the State denies due process in neither case because in both cases a definable area has been marked out or is readily ascertainable. Since these statutes are coupled usually with requirements of specific intent to commit the unlawful conduct, the risk of convicting the innocent or abridging constitutionally protected speech and press is deemed reduced to a minimal.

No such issue of "permissible uncertainty" is even reached here. The statute here, even were it a conduct statute, has the fatal defect of uncertainty in the terms

of its condemnation, in the want of definiteness in what the law prohibits at all. It is not merely a question of uncertain application or outcome in particular cases. There is no forewarning at all. There is no "common understanding," no "past usage," no "dictionary definition," no body of "judicial precedents" nor "historical precedents," no body of "scientific principles"—which can guide persons in determining what is a "lascivious thought or lustful desire," or what book will engender such thoughts and desires. If a person examines the past, or consults the present, he will only learn that nothing is more uncertain than the meanings of "obscene and indecent," of "sexual impurity," of "lascivious thoughts and lustful desire."

In *International Harvester Co. v. Kentucky*, 234 U. S. 216, 223, invalidating as offensive to due process a vague anti-trust proviso, Mr. Justice Holmes stated:

> "We regard this decision as consistent with *Nash v. United States*, 229 U. S. 373, 377, in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restaint of trade. *That deals with the actual, not with an imaginary condition other than the facts* . . . The conditions are as *permanent* as anything human, and a *great body of precedents* on the civil side coupled with *familiar practice* make it comparatively easy for common sense to keep to what is safe. But if business is to go on, men must unite to do it and must sell their wares. To compel them *to guess* on peril of indictment what the community would have given for them if *the continually changing conditions* were other than they are, to an *uncertain extent*; to *divine prophetically* what the reaction of *only partially*

> *determinate facts* would be upon the *imaginations and desires* of purchasers, is to exact gifts that mankind does not possess." (Emphasis supplied.)

The statute herein is not a *Nash* statute. It does not deal with "the actual," but solely with the "imagination." We deal here with nothing tangible or permanent; only the thought processes and desires of a human being are involved, the most changing and impermanent things in the world. There are no body of precedents, and in the nature of things there cannot be. The contents of books are as variable as men's appearances—and the judgments upon them almost as variable, if history furnishes any clue. This statute calls for "prophecy" as to what the reaction of indeterminable facts will be upon the thoughts and desires of purchasers of books. It exacts gifts which mankind does not possess, mankind including, of course, trial courts and juries.

(g) It has been urged that it is not unfair to require persons to estimate the impact of the contents of a book on the mind of the "normal sensual man," that there is no less due process in such cases than in ordinary criminal cases where a man's state of mind must be proved, or in civil or criminal cases where conduct is measured by the standards of the "reasonable man." Such arguments do not "hold water." When we speak of proving the "state of mind" of a person we are usually referring to the state of mind of an accused charged with specific wrong conduct. It is from objective circumstances and the actions of the accused that his state of mind is inferred. (*Cf., American Communications Association, C.I.O. v. Douds,* 339 U. S. 382, 411.) "

But here, the issue affects the state of mind of a hypothetical man who never even appears at the trial as a witness for the prosecution. It is the book alone, "judged by its contents" (*People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 962, 178 P. 2d 853) which serves as the prosecution witness. What the trier of the facts must therefore do is to guess or conjecture a set of circumstances surrounding a hypothetical person, and then infer an hypothetical sensual "state of mind" from the hypothetical set of circumstances, after which the inferred hypothetical state of mind is imputed to the hypothetical "normal" reader. All of this an accused under this statute is required to estimate correctly. It will be observed that in truth the accused is asked not to estimate how one "normal sensual man" will react to a book, but how twelve different "normal sensual men and women" will react. Of course, the accused eventually obtains that knowledge after verdict, but it is difficult to see how conviction has been obtained by due process of law under such circumstances. Whether the jury goes through the aforesaid ratiocination or merely votes its own moral idiosyncrasies is not free from doubt.[10a]

It is quite true that the law often requires persons to measure their conduct by the conduct of the "reasonable man." But it is a reasonable man's *conduct* which is the focus of scrutiny. It is the objective, perceived facts which men have seen occur over and over again that

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[10a] Commenting on the power vested in triers of fact, and the possibility of abuse, Chief Justice Hughes once observed that there might be the temptation to say: "'Let me find the facts for the people of my country, and I care little who lays down the general principles'". Quoted in *United States v. Forness*, 125 F. 2d 928, 942 (C. A. 2, 1942).

merge into the standard which guides reasonable men. Drunkenness arrest the limbs; driving into a crowded street at 70 miles per hour injures and kills; and lighted matches in a pile of papers cause fires. These phenomena occur with such uniformity that all are presumed to know the reasonableness of avoiding such conduct. What is involved here is solely the workings of the mind. What does a normal sensual person "think" when he reads a book? There is no objective experience, no synthesis of experience, to which one can turn in such circumstances. The "normal sensual man" is not only a hypothetical person; he cannot even be hypothesized.

In sum total, the statute here violates the due process provisions of the Constitution in its most profound respects both procedurally and as to free speech and thought. It violates the fundamental tenets that there shall be no crimes without specific laws and that the law shall not punish retroactively. It is the epitome of an alien doctrine that persons may be punished for "socially dangerous" conduct even without specific statute and by standards fixed only by a court or jury. And, it is applied to *books* and *thought*. It is essentially unfair because men can only guess at its meaning. It deprives persons in effect of all essentials of a fair trial—the presumption of innocence, proof of guilt beyond a reasonable doubt, the right of confrontation, the right to furnish evidence in one's behalf, decision by the jury on facts guided by specific standards of law furnished by the court. It permits conviction under a system of *ad hoc* legislation enacted by the judicial arm of government, and this, *ex post facto*. All of this, it should be emphasized, in the area of speech and press where each failure of *the*

judge and jury to estimate rightly may have serious detrimental consequences to the welfare of society.

In concluding this section of the brief at this point, we do not wish to imply that there are no other broad questions which may be germane to the specific issues here. For example, is the issue whether no obscenity statute can be validly enacted, or is the argument solely that the statute here is too broad in construction, and operation and effect, to avoid constitutional infirmity? We would be less than candid if we denied that we believe that all statutes which seek to regulate "sexual purity" in the minds of men offend the Constitution, although we recognize that different problems arise in a statute narrowly drawn, or particularly if narrowly drawn with respect to children who have not yet reached the age of reason. We reach this conclusion principally drawn from the lessons of history. So universal has been the error of censorship in dealing with works of art and literature, and so disastrous the consequences to individuals and to mankind, that we have come to view the type of censorship involved here on the whole as an invalid institution.

There is, on the other hand, sober and respectable opinion which believes that if the interests of the State require some intervention in the field, a statute can be drawn to meet constitutional requirements. They are exemplified by the suggestions of Judge Frank in *United States v. Roth*, 237 F. 2d 796, 825-6 (C. A. 2, 1956) and Judge Bok in *Commonwealth v. Gordon*, 66 D. & C. 101, 156 (Pa., 1949). It will be observed that in all cases the attempt is to draw the statute narrowly and to reach conduct or its direct coercion or incitation, which the State allegedly has a right to prevent, without intruding upon vital areas of freedom of speech and press. Nothing

of the sort has been attempted by the statute here, and it is for this reason that we have foregone any extended discussion of the validity of narrow "obscenity" statutes as contrasted with "no" obscenity statutes at all.

We recognize, also, that any attack upon the validity of an "obscenity" statute may seem to imply approval of "vice" as opposed to virtue, or a disregard of the alleged consequences which follow when the "bars are let down." Much depends here upon the premises with which one builds his arguments. The Platonic creed, upon which many religious systems are built, envisages human nature as perverse and corrupt, given over from its origin to vice and to passion, susceptible to every temptation, incapable of seeking by itself alone the true "moral end" by the right means. Hence a guardianship is required to make man "free" of corruption and temptation. Such guardian, be it church or government, divines the "true" code, and by compelling obedience, "frees" human nature from its corruption into the good and the true. Since the end result is "good and true;" all means, no matter how coercive, appear justified. The artist shall paint only what the depositories of faith ordain shall be painted; the writer shall think and write only what authority deems proper to think and be written. Since there is dogma, it is a foregone conclusion that there will be heresy—"men being what they are"—and this heresy must be relentlessly pursued and extirpated. No one can fail to perceive in some of the decisions in "obscenity" cases, in England and the United States, a reflection of this philosophical spirit.[11]

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[11] This philosophical school is exemplified by the writings of Plato and St. Thomas Aquinas. In Appendix "A", pp. 1-4, attached to the brief herein, we have set forth excerpts from their writings.

There is a different premise, and a different philosophical spirit which also has deep roots in the soil of civilization. Accepting the workings of a Divine Providence, it assumes that the diversities of mankind in their faiths and ways equally reflect such Divine workings and have equal value for men's personal lives and society. Public morals are built upon the private conscience, the integrity of which is accepted and cherished. It assumes the native goodness and natural rightness of the human person. Beauty, morality and truth are held insured only if there is equal liberty for different persons with their different faiths, their different thoughts, their different arts. The only public morality becomes the substitution of freedom for authority. Government, under such philosophy, exists by "consent of the governed"; a free press should be its censor, stated Jefferson. He added:

> "What has been the effect of coercion. To make one half the world fools, and the other half hypocrites. To support roguery and error all over the earth . . . if a sect arises whose tenets would subvert morals, good sense has fair play, and reasons and laughs it out of doors, without suffering the state to be troubled with it." (*Notes on Virginia, supra,* 80.)[12]

An attack upon the constitutional validity of an "obscenity" statute is therefore not a plea for "licentiousness." It is rather a defense of and dedication to the public morality upon which the Constitution and self-governing society of America were founded. In this country, we have

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[12]In Appendix "B", pp. 5-14, we have set forth excerpts from the writings of Milton, Locke, Montesquieu, Giblon and Mill which reflect the democratic view that control of moral virtue is a province of the people and not of the State.

separated Church and State. "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." (*Watson v. Jones,* 13 Wall. 679, 728.) We deny nothing here to what belongs to the State, its power to regulate conduct which objectively and directly injures members of society. We affirm merely that in the sphere of the intellect, in the realm of ideas, opinions, conscience and thoughts, citizens are freed from the yoke of authority. The State here has stepped over the line and invaded rights which rightfully belong to the people only. Whether the people will make a proper or improper use of their rights is always a gamble, but the democratic system stakes its existence on the belief that the gamble will turn out all right. Contemporary history indicates that those governments which do not hold to such belief are slated for "decline and fall."[13]

From all of the foregoing, it would appear clear that no issue of "state's rights" can be appropriately raised here. This, for two reasons. In the first place, the State is always free to deal with speech and writing which directly and externally injure persons—the uttering of slander and libels upon individuals or the coercion and incitation of acts condemned by law. "Public morality" and "public decency" can thus be protected. In the second place, neither the states nor the Federal government enjoy the "right" to offend the provisions of the Constitution. Neither is above the fundamental law. In upholding the

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[13]"The great Victorians have fixed perhaps forever in the popular mind a false picture of the decline of Roman grandeur in terms of moral decadence, and we hear much of the orgies of the Emperors, but little of the territorial and military factors in the decline of Rome. Such flattering perversion of history is really obscene." (Ernst and Seagle, To The Pure . . . (1928), 283.)

Constitution, this Court does more to preserve "state's rights" than those who invoke the doctrine whenever a claim of Federal right is denied.

We have thus attempted to delimit the issues which arise in this case. The effort has been to make clear what is in the case and what is not. In approaching now a consideration of this specific statute, we recognize that it is an "old law." It is not necessary, it is respectfully submitted, for appellant to argue that an "old law" is not *per se* a constitutional law. There are ancient laws dealing with crimes like theft, larceny, murder and other related offenses which by constant application have led to a body of judicial precedents, so uniform in decision, as to furnish one indicia of their constitutional validity, at least when due process is in question. But the construction and application of this statute as it presently appears has been sparse. It first received its present construction in 1947. (*People v. Wepplo*, 78 Cal. App. Supp. 2d 959, 178 P. 2d 853.) Moreover, the construction and application of "obscenity" statutes has not lead to uniformity, but to wide disparity and confusion. Antiquity has its value for the present age insofar as it has wisdom to impart; we are not required to take the dross along with the gold. Indeed, very little progress could be made if we did. Long judicial confusion is not a pillar of constitutional interpretation. Moreover, this is a "speech" statute and much water has flowed under the bridge since the mid-Victorian days. From the decision of this Court in *Gitlow* in 1925 to the recent decisions in *Burstyn, Gelling, Educational Films* and *Holmby*, there has grown a fresher and more concrete realization of the great values embodied in the First and Fourteenth Amendments to the Constitution. The Constitution has been upheld even as

against "old" abuses. (*Cf., Brown v. Board of Education of Topeka*, 347 U. S. 483.)

The present statute is a little Comstock Act. It deserves little veneration on that score. Nor can it be defended on the ground that a State is free to make "any experiments" it wishes. Prudery may be the motivation of any experiment; nothing can be done about that. But when the motive manifests itself in laws, it is the laws which must meet the constitutional test. Experimentations in the economic field or even in the regulation of criminal conduct objectively manifested in overt injury may be permissible under the fundamental law; but "experimentation" in the area of speech and press protected by the Constitution from state infringement cannot be supported.[14] There can be little hope for advance by experiment in the fields of economics, politics, science, arts, literature, morals, or crimes if we "experiment" with less freedom of speech and press. This is a truism which transcends state lines. If the Fourteenth Amendment "does not enact" any particular dogma, neither does it permit the arbitrary punishment of any "heretic" for the violation of dogma established by the State in the area of thoughts and desires.

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[14] "Experimentation there may be in many things of deep concern, but not in setting boundaries to thought, for thought freely communicated is the indispensable condition of intelligent experimentation, the one test of its validity." (Cardozo, *The Paradoxes of Legal Science* (1928), 105.)

B. The Identification of "Obscene or Indecent Books" Which Have a Substantial Tendency to "Deprave or Corrupt" Their Readers by "Inciting Lascivious Thoughts or Arousing Lustful Desire."

We now begin the attempt to "chart the sea" of "obscene or indecent" books. We are to explore the minds and imaginations of men and women. Our compass shows such "constants" as sexual ethics, sexual morals, sexual attitudes, sexual instincts, sexual impulses and desires. We are to determine the "prevalent sex morality" of the community, and to what extent individual readers of books conform to those standards. Do persons come to a book with minds "clean as a sheet of paper"; do they come with thoughts and desires already engendered by the chemistry of the body and early environmental influences; do their thoughts and desires conform with the existing community standards as a whole, if there be such thing; do they instead conform their thoughts and desires to either the existing "sex codes" of the state, or the church, or the family, or the club, or their friends; or do they have their own inner standards which will never see the light of day?

We do not complete our voyage by merely attempting to learn what is a "lascivious thought" or "lustful desire." The statute here requires us also to know when will the contents of a book, as distinguished from other stimuli, incite such lascivious thoughts or arouse such lustful desire. Since we cannot enter the minds of men, it is the external circumstances we must consider: What is the age of the "normal sensual" person? What is the sex of such person? What is the economic, social, religious, educational, marital, psychological and physiological, national and cultural backgrounds of such a person? Are

the responses of such person to the reading of a book the same under all circumstances and conditions? Can such matters as these be of "common knowledge"? Are they susceptible of "scientific" proof?

If the "lascivious thought" or "lustful desire" and their stimuli be thus finally isolated and defined, we shall not have concluded our task until we determine in addition when such thoughts and desires have a "substantial tendency to corrupt and deprave" the readers. Our problem is really the determining of when a "good" man becomes an "evil" man by reading books. There are even some philosophers who quail at answering this question. The road from a book to a "lascivious thought" to "substantial depravity" is a thorny one for scientists as well. The difficulty appears to be that there is nothing more variable than the mind of a human being living in a rapidly changing world of variable influences. Men do not become "evil" simply because "bad" thoughts have become imbedded in their minds. Early training and habits, maturing ethical concepts, social and religious restraints have marked influence in keeping men on the "straight and narrow." Moreover, at any given time, it is impossible to determine whether the reading of books has "substantially corrupted" a man, or whether his home life, his environment, his friends, or the domestic and international news which he hears or reads about every day have not been the principal source of his "depravity."[15] Men and

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[15] "Even if a legal sage arose to define with precision the words 'lewd', 'lascivious', 'filthy', 'indecent', 'disgusting', and 'obscene', the ultimate logic of life would remain. Life itself has deep tendencies both toward elevation and corruption. None can escape such forces from the cradle to the grave." (Ernst and Seagle, *To the Pure*. . . . (1928), 283.)

women appear to be in the process only of becoming "corrupt" or "noble" every moment of the day. Whether at any time they have actually reached one stage or another apparently can be answered by posthumous history only.[16]

1. "Common Understanding" as a Guide.

It is assumed by censorial bodies that everyone knows what is "obscene and indecent," or what a "lascivious thought and lustful desire" are. If this be so, the verbalized definitions appear strangely lacking in clarity. Reduced to their essence they are but tautologies, no more.

In 1911, the *Encyclopedia Britannica* told its readers that the meaning of "obscenity" was "decidedly ambiguous." In 1953, in the latest edition of the same compendium, the editors could only say: "'Obscene' is legally defined in the courts as 'tending to stir the sex impulses or to lead to sexually impure thoughts.'" *The Encyclopedia Americana* (1954), states that "a publication is obscene if it is likely to corrupt those whose minds are open to immoral influences and into whose hands a publication of this sort may fall." The editors add: "The criticism has been made that many works of medical or sociological importance have been kept from the market owing to the legal contention that they violate the laws

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[16]In Appendix "C", pp. 15-31, we have set forth some material on this issue. The writings of William James and Sigmund Freud indicate how complex is the cogitation of the mind and the thought processes. The writings of Weston La Barre and Dr. Albert Ellis indicate the ambivalence of sex attitudes in society. The report of Dr. Marie Jahoda and her associates shows how impossible it is to ascertain what books are responsible for erotic thoughts or the cause of sexual conduct. Theodore Schroeder discusses the constitutional infirmity of a criterion of guilt based on the psychological tendency of expressions contained in books.

pertaining to obscenity." *The New International Encyclopedia* (1924), defines "obscenity" as "conduct or published writings which have a corrupting or depraving effect on the public morals." The editors add: "There is just ground for criticism in the unintelligent and illiberal spirit in which these laws are often applied by courts and juries. . . . ." The *Columbia-Viking Desk Encyclopedia* published by the Columbia University Press (1953), perhaps wisely, omits any definition of "obscenity."

Lexicographers, of course, do the best they can, but they give no aid in determining what is and what is not obscene in literature and art. Webster's *New International Dictionary* defines the word "obscene" as "offensive to taste" or "to chastity of mind or to modesty" or "unbecoming or unseemly." The *Oxford English Dictionary* says: "Offensive to modesty or decency; expressing or suggesting unchaste or lustful ideas; impure; indecent, lewd." The *Universal English Dictionary* says: "Indecent, impure; offensive to morals or modesty"; while Funk & Wagnalls *New Standard Dictionary* defines an obscene publication as "an indecent publication which, whether true or false, tends to deprave and corrupt." "Turning from the modern dictionaries to the works of earlier lexicographers, Bailey's Dictionary gives 'filthy, unclean, unchaste, lewd, smutty'; while the learned Dr. Samuel Johnson's tome has 'immodest; not agreeable to chastity of mind; causing lewd ideas; offensive; disgusting; inauspicious; ill-omened. As synonyms Webster presents 'impure; immodest; indecent; unchaste; lewd.'

Hartrampf lists as alternatives to obscene: 'indelicate, indecent.'" (Scott, *Into Whose Hands* (Lond., 1945), 25.)

Webster's *New International Dictionary* defines "lascivious" as "wanton; lewd; lustful" or tending to produce "voluptuous or lewd emotions." It defines "lust" as a "sensuous desire; bodily appetite; specif. and most commonly, sexual desire, as a violent or degrading passion. Longing or intense desire; eagerness to enjoy." Lascivious is defined in Black's *Law Dictionary* (4th Ed., 1951) as "tending to excite lust; lewd; indecent; obscene; sexual impurity; tending to deprave the morals in sexual relations; licentious," or, "conduct which is wanton, lewd, and lustful, and tending to produce voluptuous or lewd emotions." Bouvier's *Law Dictionary* (Cent. Ed., 1948) speaks of lasciviousness as "that form of immorality which has reference to sexual impurity." The author adds: "Lasciviousness and lewdness are generally treated as interchangeable if not synonymous terms. In both cases the principal use of the two words is now in each case in a secondary or derived meaning. The primary meaning of *lascivious,* from which the first is derived, is sportiveness, and its use in a bad sense is said to be *post*-Augustine, and never by Cicero; the other is derived from the Anglo-Saxon *laewed,* lay or unlearned."

The reason why words like "obscene," "indecent," "lascivious" and "lust" in a statute dealing solely with thoughts and desires cannot be defined other than in tautological abstractions is because the primary words are

themselves abstractions, humors, emotions and moods. The words have as many variable meanings as there are different languages, countries, communities, localities, mentalities, conceptions and temperaments. In the ultimate analysis "obscenity" exists only in the mind of the one who condemns, dependent not on reason but emotion.[17]

2. Stare Decisis in the Area of "Obscenity."

Judge Bok stated in *Commonwealth v. Gordon*, 66 D. & C. 101, 116 (Pa., 1949): "The idea that instinct can be resorted to as a process of moral *stare decisis* reduces to absurdity." Another troubled court stated: ". . . the courts have gone on through the years construing and interpreting the inhibitory words of these statutes generally to agree with their own ideas of what was or was not 'obscenity' in the publication before them . . . [but] how is a court or jury to know if on reading a literary work sex ideas arise in the minds of the readers and, if so, whether they are pure or impure for, according to this test, it is only lustful or impure sex ideas with

[17]The public approach to "lasciviousness" appears so ambivalent as to negate any possibility of "common understanding". A critical student of conflicting sex attitudes in America states that the "typical American male or female has no monolithic sex attitude, but only very pluralistic attitudes. . . . Officially, legally, and traditionally, most of the sex views of our society are negativistic and disapproving, and (consciously) the majority of Americans appear to adhere to these traditional anti-sexual viewpoints. Unofficially, extralegally, and actually, however, the sex attitudes of millions of Americans (and particularly of male Americans) are at least partially positive, approving and pro-sexual." (Ellis, A. E., *The Folklore of Sex* (1951), 273. See Ch. 17, "Lasciviousness", 133-143.)

which courts and juries are concerned." (*State v. Lerner*, 81 N. E. 2d 282, 285-286 (Ohio Comm. Pl., 1948.)[18]

Precedents have value, plainly, only when they bring uniformity and certainty into the law. When, however, the only conclusions one can draw from precedent are of confusion, uncertainty and harsh and arbitrary enforcement of the law, then such conclusions would appear to confirm rather than avoid the invalidity of the statute so far as certainty and freedom of the press are concerned. In an area where history shows each succeeding generation questioning the decisions of the prior generation, while steadfastly maintaining its own as "right"; where each decision virtually deals with a different writing and a different subjective judgment based solely on personal idiosyncrasy, precedent alone would seem to be an insufficient guide. Indeed, it is a strange anomaly in the field of "obscenity" that nothing in the common law or early colonial history suggests that the mere stimulation of "lascivious thoughts or lustful desire" in itself was considered a punishable offense. "Obscenity" was always associated with attacks upon religion (blasphemy) and upon the State (sedition), or linked with incitements

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[18]The same Court added: "Pure, normal sex ideas are all right. All of mankind have sex ideas. Nature is aflame with sex ideas,—the hoot of the owl, the coo of the dove, the blossoms of the flowers, plants and trees, the spawning of the fish. Sex is the why and wherefore of living." *supra*, 286. Quere: May not, however, these written reflections of "pure, normal" sex ideas engender in a reader "lascivious thoughts and lustful desire"?

to a breach of the peace. (Schroeder, *"Obscene" Literature and Constitutional Law* (1911), 41; Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40 (1938).) It was oddly enough more than "four score and seven years" after the founding of the nation, and after the adoption of the First and Fourteenth Amendments, that "obscenity" statutes and decisions, wholly separated from blasphemy, sedition and conduct associations, began to flourish. The bewildering fact is that the only "certainty" which one can distil out of law and history in the area of "obscenity" is contained in the files of the Watch and Ward Societies and the Legions of Decency. These "precedents" are, however, a principal reason for the invalidity of statutes such as the one here involved.

(a) So far as "common law" or history in general is concerned, we have reserved for the succeeding section on free speech and censorship a particular analysis of the early English cases. So far as the issue of "certainty" is concerned in relation to procedural due process, it appears that the earliest decision on "obscenity" in the English law reports was *Sir Charles Sydles Case*, 1 Keble 620 (K. B., 1663). No question of literary misbehavior was involved.[19] It was not until 1708 that a writing was attacked as an "obscene libel" in the courts. (*Regina v. Read*, 11 Mod. 143 (Q. B., 1708).) This case is some-

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[19] "Inebriated and nude, Sir Charles had exhibited himself on a London Balcony overlooking Covent Garden and had hurled upon the populace bottles filled with an 'offensive liquor,' as judges later delicately indicated, the while he engaged in eloquent blasphemy. From this merry prank, perversely enough, was conceived our present obscenity law, with the sparkling figure of Sir Charles its innocent and unwitting progenitor." (Alpert, *Judicial Censorship of Obscene Literature, supra*, 41.)

times relied upon to show that the circulation of "obscene" literature was a crime at common law, and that "obscenity" meant then what it means now. In fact, the indictment was not sustained. Lord Holt stated: "A crime that shakes religion, as profaneness on the stage, etc. is indictable; but writing an obscene book, as that intitled 'Fifteen Plagues of a Maidenhead' is not indictable, but punishable only in the spiritual court" *supra,* 205. The first case in which an indictment was upheld for an "obscene" writing was *Rex v. Curl,* 2 Strange 789 (K. B., 1727). Curl's writing was an attack on religion. The indictment was sustained because "religion was part of the common law; and therefore whatever is an offense against that is evidently an offense against the common law." (*King v. Curl,* Barnardiston's Report 29.) The only other case, prior to the separation of the American colonies from England, was *Rex v. Wilkes,* 4 Burr. 2527 (K. B., 1770).) The case appears to have been politically inspired, and judgment was actually entered on default after Wilkes fled the country. (Schroeder, *supra,* 38.) Wilkes' "Essay on Woman" impiously interwove the name of the Deity with a description of sensuous pleasures. The judgment of conviction recited: "Being convicted of certain trespasses, contempts and grand misdemeanors, in printing and publishing an obscene and impious libel, entitled an 'Essay on Woman' and other impious libels, etc." (*Rex v. Wilkes, supra,* 2527, 2575.)

These precedents, in sum total, are what constitute the "common law" history of "obscenity." The few cases demonstrate clearly that there was no occasion nor belief that "obscenity" in literature was punishable unless it discredited the established religion, was of a seditious nature, or concerned an individual so as to provoke a breach

of the peace. There was no attempt to define the term "obscenity," nor can any basis for identification be found. Hawkins in his *Pleas of the Crown* in 1795 stated: "However, it seems clear, that no writing whatever is to be esteemed a libel, unless it reflects upon some particular person; and it seems that a writing full of obscene ribaldry, without any kind of reflection upon anyone, is not punishable, as I have heard it agreed in the court of King's bench." (Quoted in Schroeder, *"Obscene" Literature and Constitutional Law* (1911), 40.)

Judge Frank in *United States v. Roth*, 237 F. 2d 796 (C. A. 2, 1956), cert, gr. 77 S. Ct. 361, shows that such leaders as Madison, Jefferson and Franklin could hardly have assumed that it was within the competence of government to enact statutes affecting "lascivious thoughts or lustful desire." Jefferson, in 1805, in his second inaugural address, stated: ". . . the public judgment will correct false reasonings and opinions, on a full hearing of all parties; and no other definite line can be drawn between the inestimable liberty of the press and its demoralizing licentiousness. If there be still improprieties which this rule would not restrain, its supplement must be sought in the censorship of public opinion." (*Works* (Fed. Ed.), Vol. X, 135.) Franklin was not only the author of *Letter of Advice to Young Men on the Proper Choosing of a Mistress* and the *Speech of Polly Baker*, but the same frankness permeated nearly all the colonists, whose "bundling" habits appear to have the amused approval of their present descendants. 'Many a library of a colonial planter in Virginia or a colonial intellectual in New England boasted copies of Tom Jones, Tristram Shandy, Ovid's Art of Love, and Rabelais. . . .". (*United*

States v. Roth, supra, 806.[20] It may not be amiss to note, also, that while Franklin's *Speech of Polly Baker* would come within the interdiction of the statute here as "obscenity," still that same "obscenity" had concealed within it the essence of a "pure" thought. Thus, in 1904, the editors of the Works of Franklin (Fed. Ed.) stated in a footnote to *Polly Baker's Speech* (Vol. II, 129): "Two of the more elaborate of Franklin's jokes in the *Pennsylvania Gazette,* says Mr. Parton in his charming biography of Franklin, have escaped the vigilance of editors hitherto. The speech of Polly Baker is one of these; *which is not only humorous, but well rebukes the cruel immorality which sent a poor miserable drab to the whipping-post, and invited her seducer to dinner.*" (Emphasis supplied.) (See also, *"The Drinker's Dictionary," Works of Franklin, supra,* 133-139, and *"On Scandal," supra,* 139-145.)

Thus, neither at common law nor in colonial America was the incitation of "lascivious" thoughts or "lustful" desire by mere writings ever considered a "crime." It was

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[20]Despite the later advent of a powerful vocal Prudery in the 1850's, it should not be assumed that the free colonial spirit can ever be diminished. Silas Bent in his *Biography of Justice Oliver Wendell Holmes* (1932) described the Justice as "more American than most of his contemporaries." (*supra,* 15.) The Justice was a voracious reader: "No notion can be given here of the range of these adventurings; but it may as well be said now as later that he has enjoyed vastly such books as *Nize Baby, Gentlemen Prefer Blondes, Poems In Praise of Practically Nothing,* detective stories and French novels . . . naughty French Novels." (*supra,* 16.) "He used to attend a burlesque house in Washington; and one evening, when the show was a little rawer than usual, which is saying a great deal, he turned to the man on his right, a stranger, and ejaculated: 'I thank God I am a man of low tastes.'" (*supra,* 19.) The Justice also stated: "With effervescing opinions, the quickest way to let them get flat, as with the not yet forgotten champagnes, is to let them get exposed to the air." (*supra,* 6.)

not until the opening of the nineteenth century that prosecutions of "erotic" literature began to take place. Around 1815, Thomas Bowdler began expurgating Shakespeare, and still later there were "sensitive souls who found even Bowdler's Shakespeare a little too frank for their taste." (Ernst and Seagle, *To the Pure* . . . (1928), 110.) It was not until 1857 that Lord Campbell's Act (20 and 21 Vict.) was passed. The Act met great opposition from its very introduction, and the debate on the Act is of great consequence because it indicates "the insoluble enigmas of literary decency." (*Ernst and Seagle, supra* 117; see 146 Hansard, *Parliamentary Debates* (3rd ser., 1857).) The author of the measure affirmed that it was a measure "intended to apply exclusively to works written for the single purpose of corrupting the morals of youth . . ." *supra,* 327. The opponents argued that such an interpretation would seriously restrict the circulation of the press. The Lord Chancellor himself stated: "Who could tell that the superintendent of police or the magistrates before whom the application came would take a different view of what were obscene or indecent publications from the noble and learned Lord? . . . unless material alterations were made he did not think the measure could fitly become the law of the land" *supra,* 327 *et seq.* (See also, Ernst and Seagle, *supra,* 118-128.) Eleven years later, the predictions of the opponents of the measure were verified. In *Regina v. Hicklin,* L. R. 3 Q. B. 360 (1868), another anti-religious tract "The Confessional Unmasked" was brought within the ban of a statute purportedly enacted to protect "the morals of youth." Disregarding the avowed purpose of the law, and restricted by no specific definition, it was an easy matter for Lord Cockburn to conclude that the reach of

the statute and its test was whether "the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall."[21]

This incomprehensible *Hicklin* rule marked the full growth of mid-Victorianism. Eight years later Anthony Comstock fathered the Postal Censorship Law and obtained or inspired passage of obscenity laws throughout the country. No attempt at definition was made in these laws, and the courts were left to make their own construction and application as the "book might be."

(b) If history, therefore, affords no ascertainable meaning of words like "obscene," "indecent," "corruption," "depravity," "lascivious" and "lustful," it may be conjectured that perhaps the judicial application of the "obscenity" laws has led to clearer understanding. As we demonstrated in our *"Further Memorandum Submitted by Leave of Court"* (pp. 12-21), the opposite is the case. "Federal Judge Ernest Tolin, faced with the perplexing question of what constitutes obscenity, decided to consult the settled authority of judicial utterances. His researches were more baffling than enlightening, for in 1954 he discovered fourteen different judicial definitions of the term. 'No one seems to know what obscenity is. Many writers have discussed the obscene, but few agree upon even its essential nature,' complained Professors Lockhart and McClure after completing one of the most exhaustive

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[21]Of this rule, Judge Bok stated: "Strictly applied, this rule renders any book unsafe, since a moron could pervert to some sexual fantasy to which his mind is open the listings in a seed catalogue." (*Commonwealth v. Gordon*, 66 D. & C. 101, 125 (Pa., 1949).) So far as effect upon the reader is concerned, the *Hicklin* rule is embodied essentially in the statute here.

studies yet made in this field." (Gellhorn, *Individual Freedom and Governmental Restraints* (1956), 59.)

As one reads the cases, the only key to what makes a book "obscene" appears to be the suggestion of impure and libidinous thoughts. It appears to be the view that such thoughts deprave and corrupt the readers. None of the cases declare what kinds of desires, imaginations, impulses, and thoughts are impure, lascivious, lecherous, lewd, libidinous, lustful, obscene, sensual or sexual—all words which appear at one or the other time in the decisions. "Legal authorities, with much wisdom, in the statutes affecting obscenity, have made no attempt to definition. They have been content to leave the interpretation to the judge, the magistrate, or the jury. By this procedure they have avoided the difficulties in any attempt to define, in precise phraseology, what is neither more nor less than a purely emotional concept." Scott, *Into Whose Hands* (1945), 26. "Thus, 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premises, but really a small bit of legislation *ad hoc*, like the standard of care." (*United States v. Levine*, 83 F. 2d 156, 157 (C. A. 2, 1936).)

The obscurity which we observe in all the aforesaid is only deepened by a consideration of the interpretation which this Court has given to the constitutional provisions affecting liberty of thought and expression. In *Reynolds v. United States*, 98 U. S. 145, this Court found the "true distinction" to be between "mere opinion" and "actions." In *Grosjean v. American Press Co.*, 297 U. S. 233, and *Bridges v. California*, 314 U. S. 252, this Court emphasized that the "restricted rules of the English law in respect of the freedom of the press" were

never accepted by the American colonists; that the First Amendment was intended to preclude the federal government, and the Fourteenth Amendment, the states, from abridging the freedom of the press. The protection of the right is not limited "to any particular way of abridging it." To allow the press to be fettered "is to fetter ourselves." Time and again this Court has emphasized that the "people of this nation have ordained in the light of history" (*Cantwell v. Connecticut,* 310 U. S. 296, 310), that the liberties of thought, speech and press shall remain unabridged. The suppression of unpopular, annoying or distasteful ideas, this Court has held, "would be a complete repudiation of the philosophy of the Bill of Rights." (*Murdock v. Pennsylvania,* 319 U. S. 105, 116.) Finally, vagueness and indefiniteness in this area have led this Court to strike down statutes with terms of reference like "sacrilegious" (*Joseph Burstyn, Inc. v. Wilson,* 343 U. S. 495); "prejudicial to the best interests of the people" (*Gelling v. Texas,* 343 U. S. 960); "effect of this picture on unstable persons of any age level could lead to a serious increase in immorality and crime" (*Superior Films v. Department of Education,* 346 U. S. 587, reversing decision in 159 Ohio St. 315, 112 N. E. 2d 311, 318); and "cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals" (*Holmby Productions, Inc. v. Vaughn,* 350 U. S. 870, reversing decision in 177 Kan. 728, 282 P. 2d 412).

The objective guides of "common understanding" and "precedents" are therefore valueless in determining the scope of the law, either as it affects the freedom to write or the right to be free from criminal restraint under incomprehensible and retroactive statutes.

3. Scientific Guidance in the Search for Certainty.

The question remains whether the empiricism of science can help us identify what kind of a book, if any, incites "lascivious thoughts and lustful desire," and when such thoughts and desires substantially "corrupt and deprave" the reader. We do not debate here any "policy" question as to whether a State could believe that books stimulate to "bad" thoughts or "bad" acts. One cannot assert unequivocally that the reading of a book will never lead to erotic thought or conduct. But an examination of all available responsible scientific data indicates that it is simply impossible to ascertain just what book or type of book will stimulate "lascivious thoughts" in a reader, or cause him to engage in any sexual conduct, lawful or unlawful. It should be noted, however, as an offshoot of this inquiry, that all scientific investigation reveals little basis for the belief that the reading of books plays any significant part in stimulating "sexually impure" thoughts, desires or acts.

As to the meaning of a "lascivious thought" or "lustful desire," we have already indicated that no two persons are agreed. Attitudes appear markedly pluralistic and ambivalent. (Ellis, *The Folklore of Sex* (1951).)[22] One can only guess from the different books held to be "obscene"

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[22] "Do these words embrace thoughts of normal sexual intercourse? If so, within wedlock or only without? Or, on the other hand, do they embrace only thoughts of sexual perversion, including of course the sexual perversion of auto-eroticism in which the reader gains sexual satisfaction solely from reading and not from a live person of the opposite sex? None of the cases give a clear answer to any of these questions." (Lockhart and McClure, *Literature, The Law of Obscenity And The Constitution*, 38 Minn. L. Rev. 295, 330 (1954).)

that any thought of sex is included within the meaning of the words used by the courts. If this be really so, and there is much to support this conclusion, the First and Fourteenth Amendments guaranteeing freedom of thought would make any discussion of procedural uncertainty unnecessary.

(a) Assuming *arguendo* that "lascivious thoughts and lustful desire" are definable, what does science have to say as to the causal relation between books and "lascivious thoughts and lustful desire." Law enforcement officials and private censorial groups do not hesitate to assert that books stimulate "bad" sex thoughts, which thoughts in turn drive persons to "sex crimes." Usually, these claims are limited to children. In any event, it is argued that children and adults are in fact worse today than they used to be as a result of reading books, a thesis not quite acceptable in all quarters. (See, Gellhorn, *supra,* 61, note.)

Not one serious study by any responsible social scientist gives credence to the views of the vice crusaders. As Professor Gellhorn states: "With all respect to those who accept these assertions as self-evident truths, I doubt that the available evidence supports them. I think that they overstate the significance of words and pictures and understate the other elements of life that shape human behavior" *supra,* 61. It is these "other elements of life" which the censors too often ignore.

Even the slightest reflection will lead a dispassionate student to conclude that there is no unifying element in the area of stimuli to men's erotic thoughts. "Not even the sexual element is common to all modesty, shame or indecency. A study of ethnology and psychology shows that emotions of disgust, and the concept of indecency or obscenity, are often associated with phenomena having

no connection with sex, and often in many people are not at all aroused by any phase of healthy sexual manifestation; and in still others are aroused by some sensual associations and not by others; and these, again, vary with the individual according to his age, education and the degree of his sexual hyperaestheticism." (Schroeder, *"Obscene" Literature and Constitutional Law* (1911), 274.) In short, a person who reads a book while the phonograph plays "Tristan und Isolde" may dream dreams for which the book is hardly responsible. It has been urged by many responsible persons, borne out by scientific studies, that the presence of the opposite sex is the most overpowering stimulus to sex thoughts and behavior. Books appear to have very little chance against them.

Ernst and Seagle in 1928 detailed the results of a study made by the Bureau of Social Hygiene of New York City working under an endowment from the Rockefeller Foundation, *supra,* 239-249. Ten thousand questionnaires were sent to unmarried women, college graduates. Only 6% of the twelve hundred who replied received *any* sex information from the reading of books. Only 10% received *any* erotic stimulation from the reading of books. The sex information was received from such books as the "Bible," the "Dictionary," the "Encyclopedia," "Shakespeare," "Medical Books" and "Missionary Pamphlet." Stimuli to sex thoughts came from "Leaves of Grass," "Elizabethan Drama," "Literature from Aristophanes to Dante," "Song of Songs," and "Newspaper Reporting," "Stories of happily married people" and "Reading when tired."

Alpert reports another study by the American Youth Commission in Maryland. (*Judicial Censorship of Obscene Literature,* 52 Harv. L. Rev. 40, 73-74 (1938).)

This involved young people between the ages of sixteen and twenty-four. 13,528 young people were personally interviewed. Only 4% reported that their chief source of sex "education" was from books.

The Sheldon and Glueck study, *Unraveling Juvenile Delinquency* (1950) which made an intensive study of all factors and influences leading to juvenile delinquency does not even mention reading material. Delinquents, as Judge Frank observed, "are far less inclined to read than those who do not become delinquent." (237 F. 2d 796, 813.) Judge Frank also refers to other studies demonstrating "the relative unimportance of literature in sexual thoughts and behavior as compared with other factors in society" *supra*, n. 34.

Dr. Marie Jahoda and the staff of New York University's Research Center for Human Relations recently surveyed the available studies in a report entitled *The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954): The Report found that "direct experiences have a much greater directive power on human behavior than do vicarious experiences" (p. 23); that "direct contact is a more powerful influence on behavior and feelings than reading" (p. 25); that there is "no evidence for the allegation that criminal acts are likely to be initiated by the reading of 'bad' literature" (p. 27); that "people read what they like, or in other words, what fits their predispositions, personalities and interests" (p. 30); "what a reader gets out of a book is largely determined by what he brings to it" (p. 32); "a conversion of attitudes by any of the mass media is indeed a rare event, if it occurs at all" (p. 44).

The aforesaid demonstrates, it is respectfully submitted, that "obscenity" and "lasciviousness" exist in the minds and emotions of those who believe in it, and it is not a determinable quality of a book. Only a subjective element, variable and immeasurable as to the character of the stimuli capable of arousing it, is the so-called definable area of the statute here involved. The statute truly exacts gifts which mankind does not possess.

(b) As we read the statute here, the plain purport of the statute is to interdict books solely because of sexually impure thoughts which may be created in the minds of the readers. This is emphasized by the construction of the statute by the state court which speaks of solving "the problem" by considering "the impressions likely to be created," the "strong salacious appeal" which causes the book "to be bought and read on account of it." (*People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 962, 178 P. 2d 853.) We do not, therefore, reach the issue as to the scientific conclusions regarding the nexus between books and sexual misbehavior. But it will point up the nebulous character of the statute herein, the dangers to a free press, and the insubstantiality of the evil which the state seeks to prevent, to touch upon this question also.

As our discussion above indicates, there is no support for the conclusion, and no way of knowing, what book will stimulate readers to "lascivious thoughts"; or to what extent these "thoughts" will be opposed or restrained by other "thoughts," fused or canceled out in the process of cogitation; or whether, the entire process of the mind will result thereby in some anti-social conduct. Indeed, it is significant that philosophers and scientists are inclined to question whether such nexus between books and ultimate conduct can ever be made. "The offset-

ting *possibility* derives from the Aristotelian concept of emotional catharsis, shared now by many psychiatrists who believe that aggressions and frustrations that might otherwise flare into overt conduct are not fanned to flame but, instead, are more often dissipated, or at least made temporarily quiescent, by reading." (Gellhorn, *supra*, 64.) "We find it difficult to believe," stated Macauley, "that in a world so full of temptations as this, any gentleman whose life would have been virtuous if he had not read Aristophanes and Juvenal will be made vicious by reading them." (*Works* (1879), Vol. VI, 491.) "Contrary to popular misconception, people who read salacious literature are less likely to become sexual offenders than those who do not, for the reason that such reading often neutralizes what aberrant sexual interests they may have." (Karpman, *The Sexual Offender* (1954), 485.) Dr. Karpman is Chief Psychotherapist at Saint Elizabeth's Hospital, Washington, D. C. (See also, Vedder, *The Juvenile Offender* (1954), 113.)[23]

But if it is impossible to determine the causal connection between "lascivious thoughts" and "anti-social" conduct, it is equally impossible to determine what "anti-social" conduct a State normally would seek to prevent. Since we deal with "sex ideas," assumedly the conduct in question is sexual in nature. Does this include normal intercourse for the purpose of procreation? Within wedlock,

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[23] "It is well, perhaps, to stress that in this branch of the discussion we are indeed talking about abnormal rather than normal psychology. Even if it be true that reading matter may actuate the impulses of some twisted individual, can this possibility justify repressive policies that affect all alike? Should a nation's reading be tailored to fit the extremely uncertain contours of an hypothetical person with a supposedly lower threshhold of resistance than is usual? A program of censorship aimed at that end must prove to be all but limitless. (Gellhorn, *supra*, 65.)

or without? Or is it only practices of sexual perversion? The difficulty here is that many of the sex acts to which sex thoughts can allegedly lead are not offenses at all, or are condoned by a large majority of the community. Also, sex thoughts may plainly lead to marriage, a highly social act or to procreation within marriage, another socially desirable result. "At the present time 11 of the 48 states have no fornication statute, and only 18 punish a single act of intercourse between unmarried persons (four of these by fine alone) . . . American penal laws against illicit intercourse are generally unenforced . . . The reluctance to prosecute finds some justification in evidence that a large proportion of the population is guilty at one time or another of this breach of sexual mores . . . Adulterous relationships are often idealized in literary representations, and are revealed in the intimate biographies of prominent and respected figures . . . Pre-marital intercourse is also very common and widely tolerated so that prosecution for this offense is rare . . . it must be recognized, as a practical matter, that in a heterogeneous community such as ours, different individuals and groups have widely divergent views of the seriousness of various moral derelictions . . . no harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners." (American Law Institute, *Model Penal Code* (1954), Tentative Draft No. 4, 204-302.)

It is respectfully submitted that this "mental obscenity" statute offends the first requirements of procedural and substantive due process. A prohibition so indefinite and insoluble as to be unintelligible is not a prohibition by which conduct—nor even more clearly speech and press—can be governed. It is not a law at all; it is merely thun-

der and epithet. The arbitrary determination of the trier of the accused, unrestrained and undirected, becomes the sole test of right and wrong. That the pernicious consequences of such a law are not restricted to criminal prosecutions we develop particularly hereafter, but it also is important to recall that "the history of liberty has largely been the history of observance of procedural safeguards." (*McNabb v. United States*, 318 U. S. 332, 347.)[24]

Under a statute such as the one herein, a jury is left to legislate *ad hoc*, or, in other words, to punish retroactively. It is not, however, deciding as it does in negligence cases under a "standard of care." There are objective, certain and constant evidence available in such indeterminable offenses as negligence, drunkenness, breach of the peace and disorderly conduct. There are only subjective, unascertainable factors involved in determining the impact of a book upon the mind of a reader. In *Cline v. Frink Dairy Co.*, 274 U. S. 445, this Court stated: "It is true

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[24]The procedural vice is exemplified in this case. The books were introduced in evidence in groups, and each group given different exhibit numbers. (For a description of the books and their exhibit numbers, see Statement of the Case, *supra*.) After ruling out certain exhibits as "not kept for sale," the trial judge found Exhibits 9 and 11 to be obscene, although "the court has not read all these books" [R. 88]. Exhibits 1 and 5 were held not obscene [R. 88]. On appeal, appellant argued that Exhibits 9 and 11 had not been proved to be kept for sale. Respondent argued that Exhibit 5, which the trial judge had absolved, should be held obscene by the appellate court and was a sufficient basis for affirmance. The appellate court's only reply was: ". . . that some of his books were obscene we do not consider debatable" [R. 21]. Appellant does not know now which "obscene" books led to the affirmance of his conviction, or which books he may sell without subjecting himself to a second prosecution. (*Cf., DeJonge v. Oregon*, 299 U. S. 353, 362; *Cole v. Arkansas*, 333 U. S. 196.) Indeed, the conviction here may well rest upon books clearly protected from governmental abridgement by the Constitution in any view. (*Cf., Stromberg v. California*, 283 U. S. 359.)

that, on an issue like negligence, i.e., a rule of conduct for the average man in the avoidance of injury to his neighbors, every one may be held to observe it either on the civil or the criminal side of the court. It is a standard of human conduct which all are reasonably charged with knowing and which must be enforced against every one in order that society can safely exist . . . But it will not do to hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result" *supra,* 464-465. This Court held that the Fourteenth Amendment "requires that there shall be due process of law, and this certainly imposes upon a State an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is required" *supra,* 458.

This statute has a greater infirmity than the one found in *Cline v. Frink Dairy Co.,* for it holds the average man to the exercise of a psychological knowledge which no one possesses. It is not a statute which informs those who are subject to it what conduct on their part will render them liable to its penalties. It provides no guide for the judge and jury in the application of the statute nor the attorney defending the accused charged with a violation of the law. It casts a net as broad as all books in circulation and all persons connected with them, and leaves it to the jury to determine arbitrarily who has and who has not offended the law. (*Herndon v. Lowry,* 301 U. S. 242, 263-264.) It is a total surrender of legislative functions to judge and jury. It permits guilt to be inferred without any rational basis for the conclusion. It permits

adjudication outside of "the law" and eliminates any basis for appellate review. It is, in short, that type of *extraordinoria judicia* unknown to the Constitution of the United States.[25] Applied to speech and press, this evil becomes immeasurably compounded.

C. Freedom of Speech and the Press and "Obscene" Books Which Incite "Lascivious Thoughts" and Arouse "Lustful Desire."

We have sought in the previous discussion to bring the pertinent issues arising under the statute here into appropriate focus, and to demonstrate the utter indefiniteness and incomprehensibility of the terms "obscene and in-

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[25]California does not accept "sincerity of purpose" or the opinion of "literary critics". "Literary merit" is also not a criterion. (*People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 962-3, 178 P. 2d 853.) The courts purport to avoid the doctrine of "strict liability" in these cases by requiring proof of a "lewd" intent. It is an intent inferred merely from knowledge that the book is "obscene". This knowledge is assumed if the book bears "marks or indications of its character on the outside", or bears a "title enlightening or even suggestive on the subject." (*Supra*, 966.) Knowledge and intent are thus inferred from the accused's awareness in any form of the title or contents of the book. Since the statute sets no ascertainable standard of "obscenity", the utmost care could not protect an accused from prosecution under it. He can never know when a particular trier of the fact will find a book to be "obscene" which the accused did not know was "obscene". What is unknowable cannot be done knowably or wilfully, and the statutory definition of an "obscene" book cannot be derived from the mental state of the person who writes or sells it. See the general discussion contained in the opinion of Justices Roberts, Frankfurter and Jackson in *Screws v. United States*, 325 U. S. at 152-7. The statute here does not measure up to the standards prescribed by this Court in numerous cases: *United States v. L. Cohen Grocery Co.*, 255 U. S. 81; *International Harvester Co. v. Kentucky*, 234 U. S. 216; *Connally v. General Constr. Co.*, 269 U. S. 385; *Champlin Refining Co. v. Comm'n*, 286 U. S. 210; *Lanzetta v. New Jersey*, 306 U. S. 451. See also, *United States v. Evans*, 333 U. S. 483; *United States v. Reese*, 92 U. S. 214, 221; *Yu Cong Eng v. Trinidad*, 271 U. S. 500, 518; *Manley v. Georgia*, 279 U. S. 1; *Tot v. United States*, 319 U. S. 463.

decent," as expanded by the construction of the court below. We have pointed out the limitless scope of the statute as a result thereof. This portion of the brief will be devoted to the crux of the questions presented—the issue of the validity of the standard enacted by the statute in relation to the essential freedoms which the First and Fourteenth Amendments are intended to protect from all governmental intrusion.

1. The Statute Vests Censorial Powers in the Machinery of Government.

The uncanalized standard fixed by the statute here vests in the State the arbitrary power to suppress and punish any speech, art or thought deemed "obscene" by government. This is the essence of censorship in the realm of the intellect. It has been constantly reaffirmed that the basic and most "pernicious" (*Thornhill v. Alabama*, 310 U. S. 88, 98) quality of censorship as to speech and thought is the investment in government of power to suppress or allow expression, not in accordance with any confining objective standard but by arbitrary choice alone. When a government official may "make his opinion the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own,"[26] it is "this" which constitutes "the essence of censorship" (*Near v. Minnesota*, 283 U. S. 697, 713). Censorship exists when—as in the case at bar—thought and expression are made subject to the invalidity of limitless discretion, when officials of government and juries are licensed to create their own standards in each case, when

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[26] *Virginia Statute of Religious Liberty*, authored by Jefferson, quoted and expressly approved in *Reynolds v. United States*, 98 U. S. 145, 162.

the mere existence of such standards results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within their purview. (*Niemotko v. Maryland*, 340 U. S. 268, 272; *Herndon v. Lowry*, 301 U. S. 242, 263; *Thornhill v. Alabama*, 310 U. S. 88, 98.)

Whatever the form of the sanction, this Court has uniformly stricken down proscriptions or prohibitions against expression cast in vague, unconfined, censorial terms, no different in principle and in substance to the characterization "inciting lascivious thoughts" or "arousing lustful desire." Thus, the following standards contained in state statutes have failed to meet the constitutional test: "[any] malicious, scandalous and defamatory" publication; "not of good character" or "not free from fraud"; "[of] such character as to be prejudicial to the best interests of the people"; "[not] of a moral, educational or amusing and harmless character"; "sacrilegious"; "immoral . . . or . . . . of such a character [as] would tend to corrupt morals"; "criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting . . . crimes"; "obscene, indecent and immoral, and such as tend to debase and corrupt morals," even when confined by state construction to "obscene"; a cause not found to be "religious"; speech constituting a "conspiracy" "to commit acts injurious to public morals"; picketing "without a just cause or legal excuse"; "loitering" or "picketing" for objects characterized as "sweeping and inexact"; "proper or advisable"; parading without approval of city officer under standard of "the purpose of preventing riots, disturbances or disorderly assemblage"; licensing power under standard "for good reasons"; prohibition of advocacy amounting "nearly

to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others"; "opposition to organized government"; leaflet licensing statutes without any standard; sound truck permit statute without any standard; park address permit "custom" without any standard.[27]

The central evil inhering in an unconfined and unconstitutionally vague standard affecting speech and press is, therefore, the vice of total and arbitrary power of censorship inviting and authorizing those in authority to punish or permit speech and press in purely discretionary manner and as dictated by their will alone.

As applied to books, writings, art, literature or other communications, the censorial statute, punitive or preventive, both in operation and intimidating effect includes the expression of beliefs, ideas, opinions and sentiments which the Constitution protects from governmental abridg-

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[27] *Near v. Minnesota*, 283 U. S. 697, 701-2; *Schneider v. New Jersey*, 308 U. S. 147, 158; *Gelling v. Texas*, 343 U. S. 960; *Superior Films, Inc. v. Dept. of Education*, 346 U. S. 587; *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 497; *Comm. P. Corp. v. Regents*, 346 U. S. 587; *Winters v. New York*, 333 U. S. 507, 518-19; *Holmby Prod., Inc. v. Vaughn*, 350 U. S. 870, rev'g 177 Kan. 728, 282 P. 2d 412; *Cantwell v. Connecticut*, 310 U. S. 296, 301-2, 305; *Musser v. Utah*, 333 U. S. 95, 96; *Thornhill v. Alabama*, 310 U. S. 88, 91-2; *Carlson v. California*, 310 U. S. 106, 109-112; *Largent v. Texas*, 318 U. S. 418, 419; *Hague v. C.I.O.*, 307 U. S. 496, 502, 516-17; *Kunz v. New York*, 340 U. S. 290-1, 293; *Herndon v. Lowry*, 301 U. S. 242, 263-4; *Stromberg v. California*, 283 U. S. 359, 369; *Lovell v. City of Griffin*, 303 U. S. 444, 447-8; *Jones v. Opelika*, 319 U. S. 103, 104; *Saia v. New York*, 334 U. S. 558, 559-60; *Niemotko v. Maryland*, 340 U. S. 268, 269-72. Upon remand, the state court in *Musser* was unable to place a construction on the words "public morals" which would limit their meaning beyond their general meaning, and held the statute void for vagueness and uncertainty. (*State v. Musser*, 118 Utah 537, 223 P. 2d 193.)

ment. It is plain from a reading of the cases footnoted immediately above that had not this Court there intervened, the censor, whether by prior restraint or criminal punishment, would have suppressed protected expressions of ideas and opinions contained in newspapers, religious tracts, placards, motion pictures, books, peaceful assemblies and other related areas of communication. It would have suppressed ideas relative to politics, religion, government, entertainment, labor relations and a vast gamut of opinions without the consideration of which a self-governing society cannot endure. Nor should it be overlooked how broad in scope becomes the interdicted when once authority receives unfettered discretion to control the expression of the intellect. Consider, for example, the story of "The Miracle" (343 U. S. 507-508) and the attempt to suppress it under a standard of "sacrilegious"; the attempt to suppress "Native Son" as "presenting situations undesirable to the mutual interests of both races" (159 Ohio St. 315, 112 N. E. 2d 311, 313) and "La Ronde" from the writing of Arthur Schnitzler as pandering to "base human emotions" (305 N. Y. 336, 113 N. E. 2d 504), both attempts which were fortuitously frustrated (346 U. S. 487).

Statutes such as the one herein violate free speech and press because by their limitless area and scope they necessarily include within their terms utterly protected and free creative speech, art and communications. There is no basis or security in these laws for any lesser coverage or discrimination. There is in law and in overhanging threat a total inclusion of the entire realm of thought and expression of thought. Nor is this mere euphonism. History *proves*, it does not merely bear some witness to, the constitutional invalidity of these "mental obscenity"

statutes as a prohibitory standard over speech. History proves that within the compass and sweep of such undefined standards, speech, art and communication of the highest social significance and clearly embraced within the protective arms of the First Amendment have been abridged and suppressed. History proves, it may be added, that the book which incites "lascivious thoughts" or arouses "lustful desire" *must* be defended if all the books which civilization holds most dear—in science, religion, politics and the arts—are to be preserved.

2. The Historical Evidence of the Sweep of Such Standards as "Obscene" and "Lascivious."

Condemned as unreadably "obscene," "immoral" and "indecent" by some one or more of men and societies in history have been such men and works as: Keats' *Endymion;* Shelley's *Queen Mab;* Byron's *Don Juan* and *Cain;* Darwin's *Origin of the Species;* Freud's *General Introduction to Psychoanalysis;* De Maupassant's *L'Humble Verite, Une Vie, Woman's Wiles, The Wedding Night* and other stories; Voltaire's *Candide* and *The Philosophical Dictionary;* Pepy's *Diary;* Swift's *Gulliver's Travels* and *Tale of a Tub;* Hugo's *Les Miserables;* Whitman's *Leaves of Grass;* Swinburne's *Poems and Ballads;* Zola's *Nana, La Terre* and other novels; Ellis' *Studies in the Psychology of Sex;* Stope's *Married Love* and *Contraceptions;* Defoe's *Moll Flanders;* H. G. Wells' *The Work, Wealth and Happiness of Mankind;* Casanova's *Memoires;* Flaubert's *Madame Bovary;* Ibsen's *Ghosts* and *A Doll's House;* Shaw's *Mrs. Warren's Profession;* Balzac's all *Novels;* Anatole France's, all *Works;* Rousseau's *Julie;* Richardson's *Pamela;* Boccaccio's *The Decameron;* Ovid's *Elegies;* Remarque's

All Quiet on the Western Front; ALDOUS HUXLEY'S *Point and Counter Point* and *Antic Hay;* DREISER'S *An American Tragedy;* ARISTOPHANE'S *Lysistrata;* KANT'S *Critique of Pure Reason; The Bible;* CERVANTE'S *Don Quixote;* DUMAS', all *Novels;* and HAWTHORNE'S *The Scarlet Letter.*[28]

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[28]The sources in sequence are: St. John-Stevas, *Obscenity and the Law* (Lond., 1956), 46; *Moxon's Case* (1841), 2 Townsend, Mod. St. Tr. 356, St. John-Stevas, *supra,* 47-48, IV Cyc. Brit. "Suppression of Books", 246; *Lord Byron v. Dugdale,* 1 L. J. Ch. 239 and *Murray v. Benbow,* Jac. 474, n., St. John-Stevas, *supra,* 46; Gosse, *The History of the Censorship of Books* (1910); Blanshard, The Right to Read (1955), 138, Gellhorn, *Individual Freedom and Governmental Restraints* (1956), 93; IV Cyc. Brit., *supra,* 246, Ernst and Seagle, *To the Pure . . .* (1928); App. III; IV Cyc. Brit., *supra,* 246, Craig, *The Banned Books of England* (1937), 185, 117, St. John-Stevas, *supra,* 262, App. IV, Burke, *What is the Index* (1952), 90, Gellhorn, *supra,* 88; Craig, *supra,* 184, 55; Haight, *Banned Books* (1955), xi, IV Cyc. Brit., *supra,* 246; Craig, *Above All Liberties* (Lond., 1942), 38; St. John-Stevas, *supra,* 262, Burke, *supra,* 90; IV Cyc. Brit., *supra,* 246; Craig, The Banned Books of England, *supra,* 184, 92, 194; IV Cyc. Brit., *supra,* 246; Craig, *supra,* 184, 44, St. John-Stevas, *supra,* 60, 263; IV Cyc. Brit., *supra,* 246, Craig, *supra,* 184, 46, 47, 49, St. John-Stevas, *supra,* 78, 263, Burke, *supra,* 90; Craig, *supra,* 184, 25, 61, 127-135, 169, Craig, *Above All Liberties, supra,* 44 *et seq., Sexual Inversion,* Comment, *Obscenity and the Law* (1954), Crim. L. R. 817, 834 n. 29; Craig, *The Banned Books of England, supra,* 185, 117-118; Craig, *supra,* 186, 100; Craig, *supra,* 186, 97; IV Cyc. Brit., *supra* 246, St. John-Stevas, *supra,* 262, 263, Craig, *supra,* 55; Burke, *supra,* 90, St. John-Stevas, *supra,* 57; St. John-Stevas, *supra,* 78; St. John-Stevas, *supra,* 78; St. John-Stevas, *supra,* 262, Burke, *supra,* 94; St. John-Stevas, *supra,* 262, Burke, *supra,* 90; St. John-Stevas 262, Burke, *supra,* 90; St. John-Stevas, *supra,* 262, Burke, *supra* 91, IV Cyc. Brit., *supra,* 246; Gellhorn *supra* 88, St. John-Stevas, *supra,* 263; Gellhorn, *supra,* 88, St. John-Stevas, *supra,* 263; IV Cyc. Brit., *supra,* 246, St. John-Stevas, *supra,* 263; St. John-Stevas, *supra,* 183, 263; St. John-Stevas, *supra,* 263; Gellhorn, *supra,* 94; Chafee, *Government and Mass Communications* (1947), vol. 1, 255; Chafee, *supra,* 255, Schroeder, *"Obscene" Literature and Constitutional Law* (1911), 65; IV Cyc. Brit., *supra* 246; St. John-Stevas, *supra,* 262; Burke, *supra,* 97-98; IV Cyc. Brit., *supra,* 246, Gellhorn, *supra,* 56.

We have, of course, not exhausted the index *librorum prohibitorum*. The Irish censorship Board, under the standards of "indecency" and "obscenity," has banned an estimated 4,400 works. Four winners of the Nobel Prize for Literature appear on the List. The British Government *Report of the Royal Commission on Population* (1949) was placed on the list because it advocated birth control. In a debate in the Irish Senate, Senator Moore described the Board's list as "Every Man's Guide to the modern classics." (St. John-Stevas, *Obscenity and the Law* (Lond., 1956), 180, 183-184.) Solely between the years 1715-1750, France condemned, on moral bases among others, between 1,000 and 2,000 books, Voltaire being the most celebrated single victim. (Bachman, *Censorship in France from 1715 to 1750: Voltaire's Opposition* (N. Y., 1934).) Indeed, "mankind can hardly be too often reminded, that there was once a man named Socrates . . . the head and prototype of all subsequent teachers of virtue . . . [who] was put to death by his countrymen, after a judicial conviction, for impiety and immorality. Impiety, in denying the Gods recognized by the State; . . . Immorality, in being by his doctrines and instructions, a 'corrupter of youth.'" (Mill, *On Liberty* (Blackwell Ed., 1948), 21.) Tolstoty's *The Kreutzer Sonata* was banned by the Post Office Department in 1890, and Theodore Roosevelt denounced the author as a "sexual and moral pervert." (Haight, *Banned Books* (1955), 65.) In 1954, the Illinois State Library System directed that Hans Christian Andersen's *Wonder Stories* should be stamped "for adult readers only." (Gellhorn, *supra*, 56.)

Nor should it be overlooked that all of the foregoing acts of suppression and punishment were done at the time

with righteousness and certitude, with the heartiness of an indubitable conviction. Thus, a British critic wrote of Keats and *Endymion* that "not all the flimsy veil of words in which he [Keats] would involve immoral images can atone for the impurity [of *Endymion* nor for the fact that through it] he would palm upon the unsuspicious and the innocent, imaginations better adapted to the stews [houses of prostitution]." Quoted in St. John-Stevas, *Obscenity and the Law* (Lond., 1956), 46. Augustine Birrell wrote of Swift: "No fouler pen than Swift's has soiled our Literature. His language is horrible from first to last. He is full of odious images, of base and abominable allusions. It would be a labour of Hercules to cleanse his pages. . . . It is a question not of morality, but of decency, whether it is becoming to sit in the same room with the works of this divine [Dean Swift]." Quoted in Craig, *Above All Liberties* (Lond., 1942), 38. Blackwood's Magazine called Lord Byron, for his *Don Juan,* "a cool unconcerned fiend laughing with detestable glee over the whole of the better and worse elements of which human life is composed." (St. John-Stevas, *supra,* 47.) "The poem before us is one of those hole and corner deposits not only begun but spawned in filth and darkness." (*Id.,* 47.) The Saturday Review called Swinburne, for his *Poems and Ballads,* "the libidinous Laureate of a pack of satyrs." (St. John-Stevas, *supra,* 60.) Punch renamed the author, *Mr. Swineborne.* John Morley's Review read in part: "It is not merely the noble, the nude, the antic, which he strived to reproduce. . . . [There] is an enormous difference between an attempt to revivefy amongst us the grand old pagan conception of joy and an attempt to glorify all the bestial delights that the subtleties of Greek

depravity was able to contrive. . . . [No] language is too strong to condemn the mixed mildness and childishness of depicting the spurious passion of a putrescent imagination, of the unnamed lusts of sated wantons, as if they were the crown of character and their enjoyment the great glory of human life." (Quoted in St. John-Stevas, *supra,* 60-61.)

It is not essentially a matter of bad men, but of bad law and standard. The tragic and constant societal errors of suppression chronicled above confirm plainly that in history "obscenity," as a standard of prohibition over the written word, is inclusive—in gamut and reach, and necessarily so—of the finest literature, art and speech. So many errors, so serious in nature and quality, by so many men, in so many different eras, societies and circumstances, cannot otherwise be read.

Why did these events occur? The answer must be found essentially in the prohibitory standard governing speech and art. By the use of terms so broad and hateful as to defy definition and understanding—"obscene," "lascivious," "lustful"—by the use of these all encompassing terms, speech and thought patently free from governmental infringement were engulfed by an unfettered authority. That the standards would necessarily be inclusive of works of art and literature connected with matters of sex interest or stimulation is simply reflective of the logic of life itself.

There are sweeping areas of literature, art and thought which, if they are to avoid being moribund, unreal and bereft of creativity and honesty, must contain sex aspects of life, and hence some "tendency," great or less, to excite sexual, *i.e.,* "impure," thoughts. Literature and art and

thought will, therefore, continuously fuse with "obscenity," undefined. Without such fusion, literature and art cannot be free to deal with the actual in life, nor to advance the frontiers, in all fields of human endeavor and human relations. Critical art and thought in the tumbling arenas of political, religious, social, economic and cultural debate cannot be isolated from the line of sex stimuli marked by "obscenity." Science could not serve humanity if its literature did not, most directly, fuse the sex aspects encompassed by the standards, "obscene" and "lascivious." Art cannot avoid sex or its stimuli for it is bred of life itself. Under the unfettered standard of "obscenity," the beauty of Rodin's *The Kiss* or Titian's *Woman on a Couch,* or such writings as Chaucer's *Canterbury Tales* and Montaigne's *Venus and Adonis* would be lost. "Another troublesome example," stated Professor Chafee, "consists of the writings of Henry Miller, an American expatriate in Paris. If you admit that obscenity exists at all, then he is obscene. Yet some people say that he is our number-one novelist." (*Government and Mass Communications* (1947), Vol. I, 265.)

3. The Broad Standards of "Obscenity" and "Lasciviousness" Necessarily Include Ideas of Critical Value to Society.

It is of deep significance that in man's civilized literate life, the suppression of "obscenity" has recurrently provided civil authority with harsh and ready instrumentality for outlawing and exorcising critical, dissenting thought. In past societies expressions of new ideas or dissident beliefs affecting social, cultural or political institutions, or science, medicine or religion, have with revealing repetition been charged with intersecting the area of "obscenity," undefined, and their repression has been defended

as war waged against immorality and indecency. The "obscene," in terms of suppression, is often also the *critical*. "Concern about obscenity merges into a more generalized concern about supposedly dangerous thinking. . . . . In such instances books are censorially threatened because they are the repositories of ideas deemed injurious to society, or, to put it in the more common speech of the day, because they are subversive." (Gellhorn, *Individual Freedom and Governmental Restraints* (1956), 67.)

Gulliver's Travels was held "obscene." Yet it is beyond challenge that this satire was a sharp and stinging political and social criticism. In social affairs, *Mrs. Warren's Profession* is kindred. In 1672, John Milton, who immortalized man's plea for liberty of expression, had two of his works, *Eiconoclastes* and *Defense of the People of England*, publicly condemned and burned as "impious" and "treasonable," needful to be burned "that our good subjects may not be corrupted in their judgments with such wicked" matter. (Vickers, *Martyrdoms of Literature* (1891), 378-381.) "'Silence aux pauvres!'—a prudent maxim, and the conception of obscenity one of the many aids to its enforcement." (Craig, *Above All Liberties* (Lond., 1942), 151.)

Books and writings clash also with "obscenity," undefined, when treating directly with critical sexual and physical questions such as marriage happiness and relations, procreation, venereal diseases, birth control, prostitution and the like. Whether cast as scientific discussion and analysis, instruction, information, or art expression, the interrelation with "obscenity" is immediate. (Dennett, *Who's Obscene* (1930, passim.; *United States v. Dennett*, 39 F. 2d 564 (C. A. 2, 1930).) Consider the profound

social import, yet the inevitability, of the charge of "obscenity" as to the scientific treatise *Origin of the Species* by Darwin, and the novel *The Well of Loneliness* by Radcliffe Hall, "a very restrained and reasonable plea for toleration of female homo-sexuality." (Craig, *The Banned Books of England* (1937), 36, 41.)[29]

In the religious area particularly is the fusion between criticism and obscenity evident and cautioning. In both the expression and repression of religious criticism in history the role of "obscenity" has been major in import. "Heresy" and "obscenity" have often been, and have even oftener been conceived, inseparable. Suppression of heresy has thereby been invested with moral support. Conversely, attacks upon established religions and religious institutions have frequently been cast as attacks upon obscenity, immorality and baneful practices asserted to be condoned by, or to be even engaged in or fostered by, the authorities of the established institution. On both sides "obscenity" has been a weapon against toleration of differing thought.

In the connection of religious criticism and "obscenity" it is notable that both the earliest (*Rex v. Curl*) and the most famed (*Regina v. Hicklin*) of the English decisions respecting suppression of "obscenity" were concerned

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[29] "John Addington Symonds' learned and discriminating treatment of Greek pederasty, 'A Problem in Greek Ethics', written in 1873 . . . has always [of necessity] been published privately. * * * The effort [in such a case] to suppress unpalatable historical facts in the supposed interests of morality defeats its own object because, never more than partially successful, it causes confusion of counsels. I have heard the undeniable existence of a homosexual element in Hellenic culture used as an argument in support of practices which incurred almost as much social obloquy in the age of Pericles as they do today." Craig, *The Banned Books of England* (1937), 167.

with conceivedly, indeed admittedly, "scandalous" and "obscene" religious-advocacy tracts. *Rex v. Curl*, 2 Strange 788 (1727), was a prosecution and punishment founded upon a publication expressing religious criticism and opinion, albeit extreme and perhaps crude in formulation. The book concerned was entitled *Venus Dans le Cloitre, ou la religieuse en Chemise,* or in English, *Venus in the Cloister or the Nun in her Smock.* This book was a translation and republication of a French religious tract by the Abbe Barrin, originally published in France in the century preceding, as a Protestant religious tract. The decision of the Court in *Curl* pointedly observed that "morality is the fundamental part of religion, and therefore whatever strikes against that, must, for the same reason, be an offense against the.con..non law." (Barnardiston's Rep. 295, A. D. 1744.) "The case illustrates two aspects of the moral censorship of literature which are worthy of note. One is the connection between that censorship and politics, . . . the other is the fact that 'obscenity' or 'pornography' are by no means clear-cut terms indicating something of indubitable moral worthlessness. . . . 'The Nun' started her career as a Protestant tract on the religious controversy of France. Thus we see, even at this early stage, that the web the law was weaving promised many a tangle and many a contradiction." (Craig, *Above All Liberties* (1942), 34-35.)

Again, the most celebrated of English "obscenity" cases, the source of the famous "Cockburn test," *Regina v. Hicklin*, L. R. 32 Q. D. 360 (1868), also involved publication of a tract aimed at Protestant criticism of Catholicism. The pamphlet was entitled *The Confessional Unmasked.* "The pamphlet consisted of extracts from Catholic theologians, one page giving the exact original Latin

quotations and the adjoining page furnishing a correct translation thereof. . . . It was not sold for gain . . . [but on behalf] of the 'Protestant Electoral Union,' formed 'to protest against those teachings and practices which are un-English, immoral, and blasphemous, to maintain the Protestantism of the Bible and the liberty of England.'" (Schroeder, *"Obscene" Literature and Constitutional Law* (1911), 55.) It may be interesting to note that the pamphlet was actually sold by one Henry Scott, a metal broker, who obtained from time to time supplies of the pamphlet and distributed them at cost (one shilling each). An order having been made under Lord Campbell's Act to seize and destroy the copies at hand, Steele appealed to Quarter Sessions "and the Recorder, a Benjamin Hicklin, found in his favor on the ground that although the pamphlet was obscene and its indiscriminate sale and circulation was calculated to prejudice good morals, his motive in selling it was the innocent one of promoting the objects of the Protestant Electoral Union and exposing the error of the Church of Rome, particularly as regard the confessional." (Craig, *Above All Liberties* (1942), 40.) It was this decision which the judgment of Lord Chief Justice Cockburn reversed.

It gives real pause to note that the expressions of vehement religious criticism condemned for "obscenity" in *Curl* and *Hicklin* would apparently be clearly protected today under *Cantwell v. Connecticut*, 310 U. S. 296. What of a rule of law repressing "obscene" publications founded upon, for America, unconstitutional cases?

There is no limit to the number and kinds of critical thought and observation which standards such as the ones herein necessarily include. The Bible has been suppressed, even burned, either *in toto* or in specific translations, to

prevent "corruptive" influence or to protect against "immorality."[30] Under Henry VIII and Mary Tudor many bookburnings occurred, including particularly the popularized translations of the Bible, New Testament, by William Tyndale. "It was ordered that all persons possessing copies of Tyndale's or Cloverdale's English version of the New Testament or any others in English by any of the men named above [Frith, Tyndale, Wyckcliffe, Joy, Roy, Basil, Bale, Barnes, Cloverdale, Turner or Tracy], should convey them . . . to certain designated officials, by whom the books were 'incontinently' [*i.e.*, forthwith] to be openly burned." (Gillett, *Burned Books* (1932), 21.) William Kilburne declared of the John Field translation that "many Libertines and licentious people did produce, and urge this Text from the authority of this corrupt Bible . . . in justification of their vicious" practices *supra*, 26. Not only the Bible, but all manner of tracts and treatises interpreting the Bible or commenting upon religious subjects were burned. The list of books takes up sixteen pages of print in *Gillett, supra*, Vol. II, 667-682. Queen Elizabeth on her accession to the throne was equally adamant in outlawing "lewd, heretical and seditious books" directed at the Established Church, *supra*, 52-54. Yet, all of these writings struck only "at some abuse of doctrine or practice" in the Established Church (*id.*, 77-78).

The example of heresy-suppression outstanding above all others is the burning and persecution of "witches." Literally thousands of unfortunates were tortured or

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[30]Farrer, *Books Condemned to Be Burnt* (1892), 28-29; Vickers, *Martyrdoms of Literature* (1891), 225-227; Adler, *Art and Prudence* (1937), 124-125; Schroeder, *"Obscene" Literature and Constitutional Law* (1911), 78.

killed in its course. Yet no societal action was ever more avowedly rested on "obscenity" grounds that witch-extirpation. (Taylor, *Sex in History* (1954), Ch. VI, pp. 109-132.) The *Bull Summa Desiderantes* of Pope Innocent VIII against witchcraft inveighed against matters openly sexual and obscene, not theological, and asserted that witches had "abandoned themselves to . . . incubi and succubi" *id.*, 109. The official Church handbook on witchcraft, *The Malleus Malleficarum*, averred: "All witchcraft comes from carnal lust, which in woman is insatiable," and accused all witches of participating in wild sexual debaucheries in the Witches' Sabbath, and of practicing "homosexualism" and "the obscene kiss" *id.*, 115, 129, 131. "Accusations of witchcraft invariably ended with the charge that the accused had committed sodomy with the Devil 'despite his freezing coldness'" *id.*, 119. Indeed, in 1400 the civil law made "copulation with the devil" a capital civil crime *id.*, 126.

4. THE UNCONFINED STANDARDS OF "OBSCENITY" AND "LASCIVIOUSNESS" MAKE JUDICIAL DISCRIMINATION BETWEEN BOOKS A FRUITLESS AND INVALID ATTEMPT.

From all the foregoing, it appears plain, it is respectfully submitted, that "obscenity," undefined and unconfined, does include within the sweep of its terms broad areas of art, thought and speech unquestionably protected under liberty of intellect and expression, as secured by the First Amendment. The statute here has made no attempt even to narrow the standards, as has been attempted in other jurisdictions, with respect to the "antiquity" of the work, "literary quality," or "artistic, scientific, critical and/or educational" value or sincerity of

purpose of the author. This, in addition, to the total exclusion of resultant conduct as an ingredient of the offense. While these questions are therefore excluded as issues in the case, we nevertheless discuss some of these matters here as they impinge on the problem of censorship and free speech and press in the "obscenity" area.

The difficulty in delegating to judges and juries the power to make "exceptions" for particular books is that it simply opens the door, in the same unconfined and irrational way, for the exercise of arbitrary power to choose "friends" and punish "foes." The law lies then in the "exceptions," and they are not only undefined, but unexpressed. The same retrospective *ad hoc* judgments are again made with respect to expressions and thought which this Court has so uniformly condemned.

For example, it is difficult rationally to support an "exception" for the Bible or the classics of historical art. Clearly age cannot be a valid criterion or distinction, for no one can pretend that the last Michelangelo, Titian or Shakespeare has visited the earth for all time to come.

The notion that an exception can be made for books of "artistic worth and skill" also cannot bear scrutiny. Judge Frank has aptly stated that "no one can rationally justify the judge made exception. . . . Judges would have to serve as literary critics; jurisprudence would merge with aesthetics; authors and publishers would consult the legal digest for legal-artistic precedents; we would some day have a Legal Restatement of the Canon of Literary Tastes." (*United States v. Roth*, 237 F. 2d 797, 820 (C. A. 2, 1956).)

Sincerity of intent or purpose also appears to be a tenuous exception. As we indicated in our prior discus-

sion the undefined and unconfined standards of "obscene," "lewd," "lascivious," "indecent" and the like are not made knowledgable by requiring proof of "obscene," "lewd," "lascivious" or "indecent" intent. No test of intent or sincerity of purpose would have saved Keats, Byron, Swift or any of the others. Good purpose and intent are no security for any expression of thought or belief, even in religion. "The man who left on the memory of those who witnessed his life and conversation such an impression of his moral grandeur that eighteen subsequent centuries have done homage to him as the Almighty in person, was ignominiously put to dealth, as what? As a blasphemor. Men did not merely mistake their benefactor; they mistook him for the exact contrary of what he was, and treated him as that prodigy of impiety which they themselves are now held to be for their treatment of him." (Mill, *On Liberty, supra,* 22.)

Nor should it be overlooked that some of the greatest works of literature have intentionally, in form and expression, combined the "obscene" with the "pure." *Gulliver's Travels* is deeply critical, socially and politically; it was meant to be so. The book is permeated with "obscenity," undefined, and it also was patently meant to be so, and to shock as well. It would be difficult indeed to assess the quality of "dominant effect" in such work, either as to content or purpose, or in the writings or art of Zola, Chaucer, Titian or Rodin. Indeed, there are artists and creators who are unable to express the purpose of their creation. Ideas "may come, not as likenesses of anything, but as new births. They may be almost absolutely original. And as truly news in the world, in whatever degree, they will give pause to the routines of per-

ception and judgment; they will check the repetitive cycles of habit returning on itself, and compel heart and mind to stop, to look, to listen, and to take then, perhaps, new directions upon new ways of seeing, believing, and understanding." (Kallen, *The Ethical Aspects of Censorship* in 5 Social Meaning of Legal Concepts 34, 36 (1953).) To dwarf originality with "sincerity of intent and purpose" is to sterilize art and literature, a fate no better than the bonfire.

It is a belief easy to fall subject to uncritically that "obscenity" in whole and entirety is unrelated to true freedom of speech and press and played no role in the struggle for liberation of thought and the derivation of the First Amendment, and is entitled now to no share in the fruits of modern protective law. The contrary, as seen, is truly the case. So far from the struggle for liberation of press and speech being divorced from and unconnected to questions of "obscenity," the truth is, as seen above, "obscenity," as a sole, dominant or included governmental charge, played a *major* role in the suppression of thought during the years of struggle which birthed modern liberty and the First Amendment. "Obscenity" was part and parcel of the repressions of religious, political and cultural criticisms which called forth our modern law. It is not often noted now, but it is deeply educating to observe that Milton's *Areopagitica*, the landmark plea in all English history for liberty of thought and expression and the lineal forbear of our First Amendment, was called forth by suppressive censorship of a book by Milton entitled *The Doctrine of Divorce*, a writing not political nor even theological but *moral* in subject and treatment, and one immediately assailed on publication under bitterest

charges of "immorality."[31] Moreover, in contents *Areopagitica* made direct plea for freedom of books in the avowedly *moral* and "obscenity" fields, as well as other areas, to the end of enabling men to rise beyond a "cloistered virtue" only, and stultification.

Moreover, *Areopagitica* was directed against the Licensing Act of 1643, instigated by Archbishop Laud, the avowed purpose of which was greater censorial control over just such schismatical religious writings as had that very year brought the pillory, ear cutting and imprisonment to men now famed in the annals of liberty of press and speech, including Prynne, Bastwick and Free-born John Lilburn, associated in authoring and publishing anti-Episcopacy religious tractates charging gross immoralities against the established church. Bastwick's *Letany* "appeal[ed] for the truth of his charges of immorality against the clergy . . . to the actual cases that came before the High Commission." (Farrer, *Books Condemned to be Burnt* (1892), Ch. III, 86-87.) "The people strewed the way from the prison to the pillory" with flowers and sweet herbs at the pillorying, and ultimately the victims were vindicated and freed, and after *Areopagitica's* publication Laud was brought to trial and executed. (*Id.*, 83.) Liberty established itself. Let us therefore not speak of liberty of press and speech without remembering these and like pilloryings and imprisonments, and recalling the closeness, even the identity in important measure and instances, of "obscenity" to criticism and forward-looking thought.

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[31] *Areopagitica: A Speech to the Parliament of England, with Prefatory Remarks and Notes*, edited by T. Holt White, Esq., London 1819, xlviii, 15-Encyc. Brit. 507, 509.

In conclusion, we submit that the statute here, as construed, enacts a totally all-inclusive and fatally vague prohibitory standard over speech and thought, utterly ambiguous and therefore totally censorial. "This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition . . ., the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxy." (*J. Burstyn, Inc. v. Wilson*, 343 U. S. 495, 504.)

5. "Hard Core" Obscenity, Undefined, and Freedom of the Press.

Finally, in this portion of the brief, we would refer to the attempt to mark out an area of "hard core" obscenity, or "dirt for dirt's sake." The deeply held premise by some persons that there are writings which are anathema to *all* men—so hateful that *no* person would seriously defend them and so lacking in social value as to be wisely suppressed—is an issue which only tangentially arises here. We have urged, however, at the outset of our discussion that even if the statutory standard could be confined to literature containing "hard core" obscenity, which it cannot as we have shown, the constitutional issues would still intrude. The problem of what is meant by "hard core" obscenity would still remain; the suppression of books, merely because of their contents, unrelated to conduct, would still continue. Liberty of choice in the realm of the intellect would still be throttled.

It may appear acceptable to separate "good" books from "bad" books solely by their scatological or profane

contents, or by their depiction of parts of the body or acts of a private or intimate nature, which in turn may be either merely offensive, or illegal if committed, but the premises upon which such an acceptance is made are not supportable. "Public taste and standards change. The 'dirt' of today may be the art of tomorrow. One day some comic-strip artist of our time, time may be respectfully regarded as another Hogarth or Edgar Allan Poe." (St. Johns-Stevas, *Obscenity and the Law* (1956), Introduction, XI.)

That "mental obscenity" however constituted is reprehensible and evil is itself but a point of view—an opinion—and, indeed, a very contested one, and the speech, depictions and contemplations disapprobated under such thesis are merely expressions and manifestations of the contrary thought and view. It is hard to see, the while such matters are confined solely to depiction and contemplation without conduct or coercive encitement, why there alone in all the area of idea differences intervention of law rather than private exercise of thought, choice, and free exchange should rightfully provide resolution. Every communication or depiction, however "obscene" in content, communicates at the least a portion of knowledge and nature and exemplifies, if nothing more, a belief rebellious against prevailing morality, modesty and prudery, and generally supportive also of the thesis of catharticism or of need for increased social toleration and understanding of sexual extremes, abnormalities or excesses. Such ideas may prove right. It is short years since Freud's ideas were not even discussable, yet now his theses are at least cognizable everywhere. If the Kinsey Reports chronicle their interviews accurately the statistics resulting from

those studies should have surprised almost none among us, privately; publicly they created headline surprise to all but the rarest few, at least professedly. There may be a question whether our minds, which cannot be "willed" into compliant renouncing of thoughts deemed "obscene," however commanded, may not be advancing considerably more rapidly than our mores.

Truly, in democratic terms, matter which is solely contemplative and depictive cannot be anything but a virtue since, whatever its character, it is in whole merely a part of the raw material of stimuli and thought from the body of which free minds through the marketplace of exchange and opinion construct and evolve the values of society. Since such free marketplace process alone can by premise be safely entrusted to judge good from evil, it cannot but be desired that the raw origins in the process be preserved free from any prior selections. To destroy the very expression of thought in the area of "obscenity" to prevent feared acts or wrongs, destroys truly not the crime but the *man* and the very process of liberty itself in a free society.

Virtually no "obscene" literature, art or other communication is "advocative" of anything; it is rather depictive, descriptive and communicative only. No one disputes the state's power to regulate conduct which objectively and directly injures persons, whether such conduct, or incitement to conduct, be denominated "obscene" or otherwise. What is attempted here is not the regulation of conduct, but the regulation of expression or contemplation or perusal. This is done on the assumption that the very *thought* is an evil, condemned by *all*, suppressible *in se*. The mere depiction or the communication of the idea is

enough, it is argued, to warrant criminal punishment. The long struggle of mankind has eliminated such concepts in the areas of treason, sedition, blasphemy and heresy. Only in the area of "mental obscenity" are such views suggested.

The fact is that even as to conduct, societies have so varied as to what is "obscene" as to make it self-defeating to suggest that mere ideas and contemplation of matters now disapprobated, however intensely, are unreadably evil and wrong. (See App. C, pp. 18-21.) "The Mohammedans veil the faces and are not disturbed by uncovered bodies; we leave the faces bare, but would find an 'evening gown' which lays a woman nearly bare to the waist, shameful in the morning but not after sunset. Puritans will bundle, but not flirt; their Victorian descendants will flirt but not bundle. And so on, in endless variety." (Kallen, *Indecency and the Seven Arts* (1930), 37.) What will arouse condemnation as "obscenity" and "indecency," with respect to conduct or practises of the most open and intimate sexual nature, varies with race, time, place and circumstances. (Scott, *Into Whose Hands* (1945), 17-18; Chafee, *Government and Mass Communications* (1947), 263-264; Schroeder, *"Obscene" Literature and Constitutional Law* (1911), 83, 259-261, 269, 274.) And if there is no definable area in conduct, even less is there any definite area in the mere expression of "obscenity" in art, thought and literature, without engagement in conduct. The number of men and societies who have practiced or tolerated such expression is long indeed. At every stage of its development European civilization has known both "pornography" and "obscenity." Robustness and lack of inhibition characterized Anglo-Saxon and medieval literature. Bawdiness was not

considered incompatible even with religious devotion. (Craig. *Above All Liberties* (1942), 172, 185; St. John-Stevas, *supra,* 2-5.)

The truth is, in sex areas, anthropology and history demonstrate most persuasively that the content of social restraints is a matter of arbitrary, cultural mores, not of absolute and eternal "rightness," varying over the globe and throughout history after the manner of a game of spatial and temporal roulette. As to mere thought and contemplation in such areas, it would seem compellingly evident, as a matter both of liberty generally and of liberty of thought and speech specifically, that total freedom should be *particularly* required in sex areas—by liberty of speech, so that society can judge and rejudge most wisely there as to matters of conduct rightfully amenable and healthy influencing and control; and by liberty generally, so that by independence and free knowledge, contemplation and choice individual man can attain, or aspire to, true nobility and virtue.

Before we can be "certain" as to what is or what is not "hard core" obscenity, we should constantly recall, it is submitted, the nexus between books so designated and the rich minds and ideas with which they are related in past and contemporary history. A great mind like Swift wrote an "obscene" book, foreshadowing concepts which were to be later expressed in the scientific formulations of Freud and Ellis. A mind so deep and keen as Mr. Justice Holmes did not shy from "naughty French novels." Franklin authored "The Speech of Polly Baker," and also signed the Declaration of Independence. Rousseau wrote the "obscene" *Julie* and the *Social Contract*. Zola wrote *J'Accuse* and *Nana*. The close play of "pure" and "im-

pure" ideas and men cautions against suppression of "obscenity" in any idea or man.

As to reading, each reader holds the power to stop at will, and cannot be a "captive audience." None should be precluded from writing or reading as his own rather than another's taste may determine. (Gellhorn, *supra*, 101-102.) Here it is possible to allow perfect liberty of expression without involving any inevitable interference with the freedom of others. Especially is this true in matters relating to sex. If the function of democracy is to produce wise answers and solutions, then clearly it is important to permit the unfettered interplay of sex ideas. Sexual morality is a field upon which there are less final conclusions than any other. There is no common agreement on ultimate moral attitudes. This is as true of divorce, as it is of birth control or homosexuality, or "matrimonial happiness" in general. (St. John-Stevas, *supra*, 196.) Far from being unimportant, restrictions on "obscenity" in sex matters affect crucially the physical and moral health of individuals. (Scott, *Into Whose Hands* (1945), 3.)

Over his own thoughts and mind "the individual is sovereign." One is not free either to reject or commit a "vice" or "obscenity," unless he is free to know, understand and see depicted these subjects, with all their full aspects and counterpoles. "Innocence may be founded on ignorance, but virtue is evermore based upon knowledge." (Francis E. Willard, quoted in Schroeder, *Free Press Anthology* (1909), 196.) "Obscenity" lies in the conditions which render ugliness and perversity possible and not in the exposure of such ugliness or perversity. If democracy and free choice cannot be trusted in the moral area, its value is suspect in every area of human relations.

"Sometimes it is said that man cannot be trusted with the government of himself. Can he, then, be trusted with the government of others? Or have we found angels in the form of Kings to govern him? Let history answer this question." (Jefferson, *First Inaugural Address*, quoted in Jones *Primer of Intellectual Freedom* (1949), 143.)

The products of the printing-presses should be left to the judgment of the people. Choice is the indispensable foundation of democracy, and true morality in democracy's terms. That is the essential liberty, including as it must the freedom to choose wrongly as well as rightly. "I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race, where that immortal garland is to be run for, not without dust and heat. Assuredly we bring not innocence into the world, we bring impurity much rather; that which purifies us is trial, and trial is by what is contrary. That virtue therefore which is but a youngling in the contemplation of evil, and knows not the utmost that vice promises to her followers, and rejects it, is but a blank virtue, not a pure; her whiteness is but an excremental whiteness. . . . Since therefore the knowledge and survey of vice is in this world so necessary to the constituting of human virtue, and the scanning of error to the confirmation of truth, how can we more safely, and with less danger, scout into the regions of sin and falsity than by reading all manner of tractates and hearing all manner of reason? And this is the benefit which may be had of books promiscuously read." (John Milton, *Aeropagitica* (in Great Books of the Western World, pub. by Encyc. Brit., Vol. 32, pp. 390-391).)

In democratic terms there cannot be virtue without choice, nor choice without knowledge and right of contemplation. Banning "mental obscenity"—mere depictive communication and contemplation without conduct—bans not vice but virtue, or the opportunity and necessary preconditions of such, and destroys the individuality and responsibility upon which either baseness or virtue can be selected by man at all. Independence is the first precondition for worth or unworth at all in men, and destruction of the freedom essential to such destroys not evil and vice, but the *man*.

D. Freedom of Speech and Press and the Suppression of "Obscene" Books—Societal Values in Balance.

The "crucial evil" upon which the State has seized here is essentially the writing and reading of books. Literature has been compressed into the criminal law as if the problem were no different from the crime of rape or the exposure of "one's private parts in public." The specific thrust of the statute is at books which stimulate "lascivious thoughts" or "lustful desire." Yet, as to this specific evil, a developing body of scientific thought indicates that books have only a minimal connection with arousal of erotic desire, compared to a host of multifarious stimuli which the State does not purport to suppress. It is argued that back of the law is a belief that some books may cause sexual misconduct, but even less proof exists for this thesis and most clinical evidence points in an opposite direction. Moreover, what sexual misconduct is stimulated by the reading of books which a State has a right to prevent is also obscure.

As against this essentially insubstantial and ephemeral "evil," there should be weighed the consequences which flow from a statute against speech embodying the vague

and limitless standards which the one herein contains. In "balancing the scales," we submit that the demands of the Constitution are not met. The disastrous effects of the all-encompassing and wholly arbitrary statute here upon societal values of the utmost significance should not be overlooked.[32] These values, although encompassed *in toto* in freedom of speech and press, include freedom from censorship generally; freedom, especially, for art and literature to express themselves unrestrictedly; and freedom for each man in society to be free as an individual to reach social judgments on all matters including standards of morality. The narrowest of statutes in this field could work injury but the consequences of the sweeping statute at bar are disastrous.

1. The censorship of morals, of sexual purity in the minds of citizens, is at one and the same time evidence of a desire to maintain the *status quo* in sex attitudes and to suppress controversy on matters of sex and sex relations. It is a recognition in itself that in these matters there are at present different views, tastes and judgments. The attempt here is to impose the notion of authorities upon persons persuaded of a contrary view, and thus to obtain unanimity of opinion. Accustomed as we are to accept differences in areas of politics, religion and almost every other sphere of life, it is anomalous that only in the area of sex mores should repression rather than expression be the rule of law.

Under this "mental obscenity" statute, no witness ever appears to prove that he himself has been corrupted by the book in evidence. The cry for censorship in this area

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[32]In Appendix D, pp. 32-44 we have set forth some of these societal values as expounded in the writings of Milton, Macauley, Mill, Madison and Jefferson.

very seldom comes from persons who wish their own morals protected; it is the morals *of others* they are constantly seeking to control. In other words, there is developed here an authoritative group, who knows "exactly" what is the "truth" about sex morality and attitudes.

The social consequences of all of the above cannot help being unwholesome for a self-governing democratic society. Immediately, it leads to evasion, making citizens furtive evaders of a law which would censor the uncensorable. "Every censorship produces a technique of evasion as well as a technique of administration." (Harold Lasswell in III *Cyc. of Soc. Sci.*, 294.) The tendency is for sex morality to flourish "underground," venting itself on occasion into "sex revolutions." Indeed, what the censor suppresses, becomes all the more desirable because of its repression. The debt which the best seller lists owes to the censor is immeasurable. All of this, it is submitted, the freedoms guaranteed by the First Amendment were intended to prevent.

Moreover, "knowledge of censorship introduces a debasing distortion in the way an object is thereafter perceived. A book, magazine, film, painting or letter which is known to have been banned, as a whole or in part, is approached with curiosity focused upon its wickedness. . . . One of the unfortunate consquences of the New York State ban on the movie 'The Miracle' (now happily removed by Supreme Court action) was that its impact as simple drama became obscured by debate over possibly offensive interpretations." (Goodwin B. Watson, *Some Effects of Censorship upon Society*, 5 Social Meaning of Legal Concepts 73, 77 (1953), published by New York University School of Law.) Censorship, therefore, exorcises ideas of profound importance out of books by the

very stamp of "lewd" and "lascivious." In this constant search for the "obscene," the censor corrupts men and ideas, debases them and stultifies them so that persons are all the more ready for conformity and irrationality. This is not the road a democratic society can afford to travel in the atomic age.

Censorship of books for "sexual impurity" affects the health and welfare of the whole of society. The evidence is overwhelming that the dogma of the sex censor has led to sex ignorance and mental aberrations which have been responsible for increases in insanity, neuroses, venereal diseases, unhappy marriages, divorce and separation. "These miscalled 'purity' associations primarily destroy the opportunity of all for gratifying a healthy and natural curiosity and thus of necessity they aid in developing morbidity in relation to sex." (Schroeder, *"Obscene" Literature and Constitutional Law* (1911), 122.)

By the vagueness and incomprehensibility of its standards, the censor succeeds in creating fear and self-censorship in the writing and reading of all books. Everything tends to become "taboo," except as the censor ordains otherwise. "Opinions thought to be potentially subversive of governing authority and those thought to be subversive of the established social and moral order evoke an essentially similar reaction: They are too dangerous to be allowed to circulate! Thus the censorship of 'obscenity' and the censorship of 'sedition' or 'propaganda' are seen to have a common core." (Gellhorn, *Individual Freedom and Governmental Restraints* (1956), 67.)

The nub of it all is that throughout history suppression undertaken in the name of "obscenity" has ended with crippling restrictions on liberty of thought critical in each era to man's growing emancipation and enlightenment.

Religious, social, political and scientific fundamental changes have all in their time been held "obscene." The more that thought in any era has probed the fundamentals of accepted society, on whatever score the more surely has such thought been condemned as "fearful," "scandalous," "immoral" and "obscene." And always the repression has been with *righteousness*. The Maid of Orleans and Tyndale's Bible[33] were burned with fervor. In history, righteousness has ever been but one century removed from proven error and misapprehension.

The expression of sexual freedom and exploration in such thought is today often treated as "witchery." Yet, if we hold faith in the democratic premise, we cannot fear the circumstance that many men in the private, "ballot box" immunity of individual reading, may select and choose literature constituted by professed societal standards as "obscene." One cannot well accept a principle that truth is best reached in common by private uncoerced thought and judgment, and then dispute the results when such are unpleasing. The wide reading of so-called obscene books should be viewed as the cautioning and healthy sign of democracy that private judgment is in measurable degree diverging from the professed social standards of an alleged majority. The indication is that perhaps here, again, mankind is, or may be, emergently awakening from "the deep slumber of a decided opinion." (Mill, *On Liberty* (1946), 38.)

2. In restricting the expression of ideas in art and literature, as markedly as these "obscenity" statutes have done in history, the Censor succeeds in virtually emasculating the entire cultural, spiritual and intellectual life of

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[33]Now the English received translation." (Farrer, *Books Condemned to be Burnt*, *supra*, 28.)

a people. Art and literature do mirror life and they do portray life "in the raw." The Censor would destroy these portrayals on the assumed peril of "corruption of the spirit."

Art and literature do more—they stimulate the imagination, they suggest a "life beyond life" in fictional characters, sometimes beyond conception. To the Censor, this seems to discredit the *status quo*, the morally conventional pattern. Unless art and literature are devoted to authority, they become suspect. "But in general the literary artist has tended to be a revolutionary rather than a conservative. To picture or even to mention 'the light that never was, on sea or land' is to turn the imagination from what is to what may be or at least once to conceive would be to desire." (Irwin Edman, II *Cyc. of Soc. Sci.*, 225.)

As against these "dangers" which bring the deadening hand of the censor into play, should be considered the important individual and social functions of art and literature. Art and literature are conditioned by the social circumstances in which the artist works. Their themes are a reflection of society at any given time in all its manifold manifestations. They reflect the different and shifting standards of taste, politics, morals and other social values. They express the endless variety of opinions on everything from dress to philosophy or religion. They afford opportunities for play, for relaxation, for satisfaction, and above all, opportunities for the search for truth in every area of human experience. The "pursuit of happiness" is impossible without them.

3. Finally, suppression of writings because of their "obscene" contents does violence to the fundamental principles upon which the security of the Nation depends.

It does violence to the fundamental democratic philosophy embodied in the writings of Milton, Mill and Jefferson and which have been the warp and woof of American society. Freedom of speech and press are not merely the means of permitting minority opinion to express itself; freedom of speech and the press is of intrinsic value to the whole of society as the best means of attaining progress in civilized life. The history of Western civilization is in large measure a history of the struggle for unfettered liberty of thought.

Free speech and press base themselves upon the conclusion, fortified by experience, that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." No official of government is deemed wise enough to be trusted to discriminate between valid and invalid ideas. These freedoms recognize that suppression of itself either tends to impart a seeming validity to the idea or that the idea, if valid, will survive such persecution. "On the other hand, if opposition by speech is allowed, it will be impotent if the speech is mere fulmination; if the thought is valid it will effect the inevitable change in existing institutions by the nondisruptive process of conversion." (J. M. Landis, VI, *Cyc. of Soc. Sci.*, 458.)

At the root of all suppression of freedom of speech and the press is a fear of unorthodoxy, whether in religion, politics or morals—a fear which has no excuse nor place in our strong democracy. The continuance of that strength depends upon the freedom to think, to question, to speak, to write—and for the other person to listen and to read. Only in this way can a society grow from ignorance and irrationality to knowledge and reason, the firmest pillars of public morality.

II.

The Statute, Penal Code, Section 311, as Applied Here to the Mailing of Circulars and the Keeping of Books for Sale by Mail Is Repugnant to Article I, Section 8, Clause 7 of the United States Constitution and Unlawfully Infringes on a Sphere of Activity Reserved Exclusively to the Federal Government, Respecting Which the Federal Government Has Fully Legislated, Preempting the Field.

Appellant operated a mail order business [R. 101]. He mailed [R. 47-48, 107-109] advertising brochures which show on their face a mail order operation [Ex. 2, R. 26; Ex. 3, R. 27; Ex. 8, R. 32]. He then filled by mail the orders received by mail [R. 101, 108, 110]. Respondent built its case around appellant's mailing activities, introducing as Exhibit 7 [R. 29] "three small packets of gum backed labels which appear to be for the purpose of placing on a mailed envelope. One is labeled 'S Shop, Box 24646, West Hollywood 46, California.' Another is labeled 'From Sailor Jock's Club, 8923 Sunset Strip, Los Angeles 46, California.' The third is labeled 'This parcel may be opened if necessary Mail Merchandise Mart, Hollywood 46, California, contents merchandise books.'"

Respondent's witnesses spoke of seeing "mailbags" in the warehouse [R. 31] and the office [R. 35], and of seeing six women "busy typing addresses from an address list onto envelopes which contained these brochures" [R. 35], and of seeing [R. 36] and taking [R. 33] "mailing lists." Mrs. Regas, former employee of appellant [R. 46-47] testified that advertising brochures were mailed from the office [R. 47] and that she affixed gummed labels to envelopes containing one or more of appellant's business names [R. 48].

The inescapable conclusion flowing from Mrs. Regas' testimony [R. 46-50] and the entire record is that appellant was engaged solely in a mail order business and that he was convicted for his mailing activities [R. 80-81]. It should be observed that California does not seek to criminalize the possession alone of obscene books but only possession and keeping *for sale*. Here, as we have seen, the only proof of a possession for sale consists of the proof of keeping for mailing.

A. The Keeping of "Obscene" Books for Mailing and the Mailing of an Advertisement of Such "Obscene" Books Is Subject to Federal Jurisdiction.

Congress has made it a crime to mail or advertise by mail an obscene book (18 U. S. Code, Sec. 1461). It is also a federal offense to import or to place with a common carrier for interstate or foreign commerce an obscene book (18 U. S. Code, Sec. 1462). In 1955 Congress made it a crime to transport in interstate or foreign commerce an obscene book (18 U. S. Code, Sec. 1465). Congress has also enacted legislation denying mailing privileges to anybody advertising by mail or mailing an obscene book (39 U. S. Code, Sec. 259a). In aggravated cases the Postmaster General may deny mailing privileges without notice or hearing to a person who advertises by mail or mails an obscene book (39 U. S. Code, Sec. 259b).[34] These Acts have been given broad reach. (*United States v. Alpers*, 338 U. S. 680; *Hornick v. United States*, 229 F. 2d 120 (C. A. 3, 1955). Congress has not, however,

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[34]This legislation followed the opinion of Mr. Justice Douglas in *Stanard v. Olesen*, 74 S. Ct. 768 which stated that absent specific congressional authorization the Postmaster General had no power to impound mail without notice and hearing.

made it a crime nor has it sought to reach in so many words the keeping for mailing of "obscene" books. It is clear, however, that *if*, as we assume for the purpose of this argument, Congress may forbid the actual mailing of obscene books, it plainly could, if it wished, regulate the *keeping* of said books for mailing, as well as the ultimate mailing. It has been held, for example, that interstate commerce is not confined to transportation from one state to another but "comprehends all commercial intercourse between different states and *all the component parts of that intercourse.*" (Emphasis supplied.) (*Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282.) In *Pensacola Teleg. Co. v. Western Union Teleg. Co.*, 96 U. S. 1, 9, the court said of the postal powers:

> "The powers . . . granted . . . were entrusted to the general government for the good of the nation. [Therefore] it is not only the right but the duty of Congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation."

In *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, the Court held that the constitutional power of the United States over its waters was not limited to control for navigation. The authority, the Court held, "is as broad as the needs of commerce." *Supra*, at 426. In the Shreveport case, *Houston & Texas Ry. Co. v. United States*, 234 U. S. 342, the Court held that the Interstate Commerce Commission could set local rates for clearly intrastate transportation, saying that Congress possesses "the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate

carriers may thereby be controlled." *Supra,* at 353. In *Swift & Co. v. United States,* 196 U. S. 375, the defendants contended that certain of the acts in restraint of trade were not acts of interstate commerce and so did not fall within a valid reading of the Sherman Act. The Court however, sustained the Government on the ground that the "scheme as a whole" came within the Act and that the local activities alleged were simply part and parcel of this general scheme. In *United States v. Wrightwood Dairy Co.,* 315 U. S. 110, the Court sustained an order of the Secretary of Agriculture fixing the minimum prices to be paid to producers of milk in the Chicago "marketing area." The dairy company demurred to the regulation on the ground of its applying to milk produced and sold intrastate. The Court sustained the regulation, pointing out that since Congress had the power to regulate the price of milk distributed through interstate commerce "it possesses every power needed to make that regulation effective" including the right to regulate milk produced and sold intrastate. The power, it observed:

> "extends to those activities intrastate which so affect interstate commerce or the exertion of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end."

Noting that the "power of Congress over interstate commerce is plenary and complete in itself" the Court concluded that

> "no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power." (*Supra,* at 118-119.)

Because the postal powers have been given by the Constitution to the national government, and because the national government owns and operates the postal powers as well as regulates it, the national control over the mails is even broader than its control over interstate commerce which it merely regulates. In *Pensacola Teleg. Co. v. Western Union Teleg. Co.*, 96 U. S. 1, the Court struck down a state statute which granted to one company an exclusive right to operate a telegraph business in the state. The law was found to be incompatible with a federal act which granted to any telegraph company the right to construct its lines upon postal roads. The Court held that the national control over commerce and the post roads prohibited a state from granting the monopoly there in question. In *Johnson v. Maryland*, 254 U. S. 51, it was held that a state could not punish a person for operating a mail truck without procuring a license from the state authorities. In *Illinois C. R. Co. v. Illinois ex rel Butler*, 163 U. S. 142, an Illinois statute which as construed by the state courts required an interstate mail train to make a detour of seven miles in order to stop at a designated station was held unconstitutional as being in conflict with the postal powers granted to Congress.[35]

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[35]The Court has approved some state regulations which, unlike the case at bar, have a trivial or remote relation to the operation of the postal service. *Gladson v. Minnesota*, 166 U. S. 427 (intrastate train had to stop at county seat when it could do so without deviating from its course.) *Price v. Pennsylvania Ry. Co.*, 113 U. S. 218; *Martin v. Pittsburgh & L.E.R. Co.*, 203 U. S. 284 (local laws classifying postal workers with railroad workers for the purpose of determining a railroad's liability for personal injuries); *Railway Mail Assn. v. Corsi*, 326 U. S. 88 (subjecting a union of railway mail clerks to a general law forbidding any labor organization to deny any person membership because of his race, color or creed); *United States v. Kirby*, 7 Wall. 482 (arrest of postal employee charged with murder while engaged in carrying out his official duties.)

In *In re Debs,* 158 U. S. 564, the Court gave perhaps its broadest interpretation of the scope of the postal powers. Speaking of the national power over interstate commerce and transportation of the mails, Justice Brewer for the Court said:

> "While under the dual system which prevails with us the powers of government are distributed between the state and the nation and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and in the exercise of those enumerated powers, acts directly upon the citizen and not through the intermediate agency of the state." (*Supra,* at 578.)

Pointing out that Congress has by a mass of legislation established the "great post office system of the country, with all its detail and organization, its machinery for the transaction of business, defining what shall be carried and what not," the Court noted:

> "Obviously these powers given to the national government . . . . were not dormant and unused. Congress has taken hold of these matters and by various and specific acts has assumed and exercised the powers given to it and was in the full discharge of its duty to regulate . . . . the mails. The validity of such exercise, and the exclusiveness of its control, has been again and again presented to this court for consideration." (*Supra,* at 580-581.)

The Court, citing *Searight v. Stokes,* 3 How. 150, observed that the United States has a property interest in the mails, saying:

> "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of

all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails." (*Supra*, at 582.)

In all we have said so far we have assumed the constitutionality of the congressional acts prohibiting the mailing of "obscene" matter. We have done so because we do not understand the respondent to question the constitutionality of the federal statutes, but rather, respondent takes the position that the federal acts do not cover the field exclusively, but on the contrary leave the states with control over "keeping for sale by mail" of obscene matter. The determination of whether Congress has sought to occupy exclusively a given field of operation—mailing (including keeping for mailing) of "obscene" books—is dependent upon an analysis of the statutes in question and circumstances upon which it was intended to operate. (*Pennsylvania v. Nelson*, 350 U. S. 497; *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218; *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148.)

B. "Keeping for Sale by Mail" of "Obscene" Books Is Subject to Exclusive Federal Jurisdiction; the State Has No Power in This Area.

We deal here only with the conviction under Count I (keeping obscene books for sale by mail) since it presents a more controversial question than Count II (mailing advertisements of obscene books). The federal acts deal precisely with the latter situation and preemption is therefore more obvious. Indeed, if the state as well as the federal government could punish for mailing an advertisement of an "obscene" book, appellant would be subject to double

punishment for the same overt acts, which raises additional constitutional questions. (*Pennsylvania v. Nelson,* 350 U. S. 497, 509; *Cf. Houston v. Moore,* 5 Wheat. 1, 31, 75; *Jerome v. United States,* 318 U. S. 101, 105.)

(1) THE SCHEME OF FEDERAL REGULATION IS SO PERVASIVE AS TO MAKE REASONABLE THE INFERENCE THAT CONGRESS LEFT NO ROOM FOR THE STATES TO SUPPLEMENT IT.

Congressional power over the mails is practically plenary. (U. S. Constitution, Art. I, Sec. 8, Clause 7; *Donaldson v. Read Magazine,* 333 U. S. 178; *Milwaukee Publishing Co. v. Burleson,* 255 U. S. 407; *Lewis v. Morgan,* 229 U. S. 288; *Public Clearing House v. Coyne,* 194 U. S. 497; *In re Debs,* 158 U. S. 564; *Ex Parte Jackson,* 96 U. S. 727.) And as we observed Congress has fully legislated in the field (18 U. S. Code, Secs. 1461, 1462, 1465; 39 U. S. Code, Sec. 259, subds. (a), (b) and (c).)

The conclusion is inescapable that Congress has intended to occupy the field of obscenity in the mails.

> "Taken as a whole, they evince a Congressional plan which makes it reasonable to determine that no room has been left for the state to supplement the federal law." (*Pennsylvania v. Nelson, supra,* at 504.)

Therefore, a state obscenity law touching the mailing of obscene matter "is superseded regardless of whether it purports to supplement the federal law." (*Pennsylvania v. Nelson, supra,* at 504.)

> "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition and a state law is not to be declared a help

because it attempts to go farther than Congress has seen fit to go." (*Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 604.)

"For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for the purposes or by methods which the federal act prohibits." (*Garner v. Teamsters Union*, 346 U. S. 485, 500.)

In *Dumont Laboratories v. Carroll*, 184 F. 2d 153 (C. A. 3, 1950), cert. denied, 340 U. S. 929, the Court held that Pennsylvania could not apply its censorship law to television programs originating in Pennsylvania since control of radio and television was exclusively within federal jurisdiction.

(2) The Federal Statutes Touch a Field in Which the Federal Interest Is so Dominant That the Federal System Must Be Assumed to Preclude Enforcement of State Laws on the Same Subject.

The power of Congress over the mails is broader and more complete than its power over interstate commerce. This is so because the government is the creator, owner and operator of the postal system, whereas it merely regulates interstate commerce. In this area federal power is practically plenary. (*Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407; *In re Debs*, 158 U. S. 564; *Hines v. Davidowitz*, 312 U. S. 52.) Moreover, we are here dealing with a First Amendment question and all such questions are peculiarly within this Court's ultimate protective powers. (*West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 640.) Freedom of press, of

course, comprehends every sort of publication which affords a vehicle of information and opinion. Such liberty is protected at every step in the process of creation, publication and circulation from the writing and imprinting of the work until it reaches the hands of the ultimate reader. As Mr. Justice Hughes said in *Lovell v. Griffin*, 303 U. S. 444, 452, quoting from *Ex Parte Jackson*, 96 U. S. 727:

> "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed without the circulation the publication would be of little value."

Concededly the term "obscene" is vague and unconfined. Accordingly, it is of the utmost importance that in this field government speak with one and not many voices. It is bad enough that federal departments disagree with one another[36] without adding the confusion of forty-eight states each separately declaring what is non-mailable because obscene. In *In re Debs*, 158 U. S. 564, the Court was concerned with state interference with the mails, observing:

> "If all the inhabitants of a state or even a great body of them should combine to obstruct interstate commerce or the transportation of the mails, prosecution for such offenses had in such a community would be doomed in advance to failure and if the certainty of such failure was known and the national government had no other way to enforce the freedom of interstate commerce and the transportation of the

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[36]In *Commonwealth v. Gordon*, 66 D. & C. 101, 117 (Pa., 1949), the court said: "Research discloses a curious but complete confusion between the Post Office and the Customs over what constitutes obscenity. No unanimity of opinion unites these two governmental services in a common standard. Books have cleared the port only to find the mails closed to them; others printed here have circulated freely while copies were stopped at the ports."

> mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single state." (*Supra*, at 581-582.)

And so it is here. In *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P. 2d 853 (1947), the Appellate Department of the Superior Court adopted the Massachusetts definition of obscenity found in *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945), rejecting the federal rule as stated in *United States v. One Book Entitled Ulysses*, 72 F. 2d 705 (C. A. 2, 1934):

> "We do not assent to everything said in that [Ulysses] case which appears to have gone to the extreme of liberality in its interpretation of the statute in favor of the book."

In *Commonwealth v. Isenstadt, supra*, the book "Strange Fruit" was found obscene. Three years later the book "Forever Amber" was found by the same court to be not obscene. (*Attorney General v. "Forever Amber,"* 323 Mass. 302, 81 N. E. 2d 663 (1948). Two years later "God's Little Acre" was found to be obscene, the court conceding that the same book had been found not obscene in the States of New York and Pennsylvania. (*Attorney General v. God's Little Acre*, 326 Mass. 281, 285; 93 N. E. 2d 819 (1950).)

If then "God's Little Acre" is by federal standards mailable because not obscene and yet is obscene by state standards and a person convictable because he kept "God's Little Acre" for mailing, it is obvious that there would be state interference with federal control of the mails. It would be awkward, to say the least, to have books travel-

ing through the mails change their character from "obscene" to "non-obscene" as they travel in the mails from one state to another. In this area government should speak with one voice. This is only possible if there is a national standard for "obscenity" in mailing and keeping for mailing.

> "It is no longer possible that free speech be guaranteed federally and denied locally; under modern methods of instantaneous communication such a discrepancy makes no sense. If speech is to be free anywhere, it must be free everywhere, and a law that can be used as a spigot that allows speech to flow freely or to be checked altogether is a general threat to free opinion and enlightened solution. What is said in Pennsylvania may clarify an issue in California, and what is suppressed in California may leave us the worse in Pennsylvania. Unless a restriction on free speech be of National validity, it can no longer have any local validity whatever." (*Commonwealth v. Gordon, supra,* at 136.)

(3) Permitting a State to Punish for "Keeping for Sale by Mail" Obscene Books Presents a Serious Danger of Conflict With Federal Administration of the Federal "Obscenity" Statutes.

Plainly, different courts define and interpret obscenity in many different ways. This can only lead to conflict.

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." (*Garner v. Teamsters Union,* 346 U. S. 485, 490-491.)

> "Should the states be permitted to exercise a concurrent jurisdiction in this area, federal enforcement would encounter not only the difficulties mentioned [in Garner v. Teamsters Union] but the added conflict engendered by different criteria of substantive offenses." (*Pennsylvania v. Nelson, supra*, at 509.)

Here we have "a multiplicity of tribunals . . . a diversity of procedures" (*Garner v. Teamsters Union, supra*, at 490), *and* an avowed "different criteria of substantive offenses." (*Pennsylvania v. Nelson, supra*, at 509.)

Conclusion.

For the reasons stated, the judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX A.

The Platonic Creed—State Control of Moral Virtue.

PLATO

The Dialogues of Plato—The Republic, Book III

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 7, p. 334).

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I perceive, I said, that you have or have had experience of this sort, and I agree. But let me ask you another question: Has excess of pleasure any affinity to temperance?

How can that be? he replied; pleasure deprives a man of the use of his faculties quite as much as pain.

Or any affinity to virtue in general?

None whatever.

Any affinity to wantonness and intemperance?

Yes, the greatest.

And is there any greater or keener pleasure than that of sensual love?

No, nor a madder.

Whereas true love is a love of beauty and order—temperate and harmonious?

Quite true, he said.

Then no intemperance or madness should be allowed to approach true love?

Certainly not.

Then mad or intemperate pleasure must never be allowed to come near the lover and his beloved; neither of them can have any part in it if their love is of the right sort?

No, indeed, Socrates, it must never come near them.

Then I suppose that in the city which we are founding you would make a law to the effect that a friend should use no other familiarity to his love than a father would use to his son, and then only for a noble purpose, and he must first have the other's consent; and this rule is to limit him in all his intercourse, and he is never to be seen going further, or, if he exceeds, he is to be deemed guilty of coarseness and bad taste.

I quite agree, he said.

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SAINT THOMAS AQUINAS

The Summa Theologica

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 20, pp. 213-214).

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QUESTION XCII

Of The Effects Of Law

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. . . a law is nothing else than a dictate of reason in the ruler, by whom his subjects are governed. Now the virtue of any subordinate thing consists in its being well subordinated to that by which it is regulated. Thus we see that the virtue of the irascible and concupiscible faculties consists in their being obedient to reason; and accordingly the virtue of every subject consists in his being well subjected to his ruler, as the Philosopher says. But every law aims at being obeyed by those who are subject to it. Consequently it is evident that the proper effect of law is to lead its subjects to their proper virtue; and since virtue is "that which makes its subject good," it follows that the proper effect of law is to make those to whom it is given, good, either absolutely or in some particular respect. For if the intention of the lawgiver is fixed on true good, which is the common good regulated according to Divine justice, it follows that the effect of the law is to make men good absolutely. If, however, the intention of the lawgiver is fixed on that which is not good absolutely, but useful or pleasurable to himself, or

in opposition to Divine justice; then the law does not make men good absolutely, but relatively, that is, in respect to that particular government. In this way good is found even in things that are bad of themselves; thus a man is called a good robber, because he works in a way that is adapted to his end.

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APPENDIX B.

The Democratic Creed—Control of Moral Virtue as the Province of the People and Not of the State.

JOHN. MILTON

Areopagitica

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 32, pp. 390-391).

* * * * * * * * *

How great a virtue is temperance, how much of moment through the whole life of man! Yet God commits the managing so great a trust, without particular law or prescription, wholly to the demeanour of every grown man. And therefore when He Himself tabled the Jews from heaven, that omer, which was every man's daily portion of manna, is computed to have been more than might have well sufficed the heartiest feeder thrice as many meals. For those actions which enter into a man, rather than issue out of him, and therefore defile not, God uses not to captivate under a perpetual childhood of prescription, but trusts him with the gift of reason to be his own chooser; there were but little work left for preaching, if law and compulsion should grow so fast upon those things which heretofore were governed only by exhortation. Solomon informs us, that much reading is a weariness to the flesh; but neither he nor other inspired author tells us that such or such reading is unlawful: yet certainly had God thought good to limit us herein, it had been much more expedient to have told us what was unlawful than what was wearisome. As for

the burning of those Ephesian books by St. Paul's converts; 'tis replied the books were magic, the Syriac so renders them. It was a private act, a voluntary act, and leaves us to a voluntary imitation: the men in remorse burnt those books which were their own; the magistrate by this example is not appointed; these men practised the books, another might perhaps have read them in some sort usefully.

Good and evil we know in the field of this world grow up together almost inseparably; and the knowledge of good is so involved and interwoven with the knowledge of evil, and in so many cunning resemblances hardly to be discerned, that those confused seeds which were imposed upon Psyche as an incessant labour to cull out, and sort asunder, were not more intermixed. It was from out the rind of one apple tasted, that the knowledge of good and evil, as two twins cleaving together, leaped forth into the world. And perhaps this is that doom which Adam fell into of knowing good and evil, that is to say of knowing good by evil. As therefore the state of man now is; what wisdom can there be to choose, what continence to forbear without the knowledge of evil? He that can apprehend and consider vice with all her baits and seeming pleasures, and yet abstain, and yet distinguish, and yet prefer that which is truly better, he is the true wayfaring Christian.

I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race, where that immortal

garland is to be run for, not without dust and heat. Assuredly we bring not innocence into the world, we bring impurity much rather; that which purifies us is trial, and trial is by what is contrary. That virtue therefore which is but a youngling in the contemplation of evil, and knows not the utmost that vice promises to her followers, and rejects it, is but a blank virtue, not a pure; her whiteness is but an excremental whiteness. Which was the reason why our sage and serious poet Spenser, whom I dare be known to think a better teacher than Scotus or Aquinas, describing true temperance under the person of Guion, brings him in with his palmer through the cave of Mammon, and the bower of earthly bliss, that he might see and know, and yet abstain. Since therefore the knowledge and survey of vice is in this world so necessary to the constituting of human virtue, and the scanning of error to the confirmation of truth, how can we more safely, and with less danger, scout into the regions of sin and falsity than by reading all manner of tractates and hearing all manner of reason? And this is the benefit which may be had of books promiscuously read.

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JOHN LOCKE

An Essay Concerning Human Understanding

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 35, p. 231):

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12. *Its enforcement is commendation and discredit.* If any one shall imagine that I have forgot my own notion of a law, when I make the law, whereby men judge of virtue and vice, to be nothing else but the consent of private men, who have not authority enough to make a law: especially wanting that which is so necessary and essential to a law, a power to enforce it: I think I may say, that he who imagines commendation and disgrace not to be strong motives to men to accommodate themselves to the opinions and rules of those with whom they converse, seems little skilled in the nature or history of mankind: the greatest part whereof we shall find to govern themselves chiefly, if not solely, by this *law of fashion*; and so they do that which keeps them in reputation with their company, little regard the laws of God, or the magistrate. The penalties that attend the breach of God's laws some, nay perhaps most men, seldom seriously reflect on: and amongst those that do, many, whilst they break the law, entertain thoughts of future reconciliation, and making their peace for such breaches. And as to the punishments due from the laws of the commonwealth, they frequently flatter themselves with the hopes of impunity. But no man escapes the punishment of their

MARIE JAHODA

(and the Staff of the Research Center for Human Relations, New York University, March 1, 1954).

The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate

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(Pp. 15-16):

We can now briefly summarize the psychological assumptions made in the public debate of the impact of "bad" books on the reader:

The affecting agent: There is little consensus on what constitutes a "bad" book beyond the tautological statement that a "bad" book is one that has a "bad" effect. However, implied in many statements is the notion that the description of socially disapproved behavior, particularly but not exclusively in the realm of sex, constitutes the affecting agent. Some persons claim that such descriptions are "bad" unless the author describes them in order to disapprove of them. Others maintain that the descriptions in themselves are objectionable, even if the author adds to them his own disapproval.

The nature of the effect: Here we find a wide variety of assumptions, ranging from *a deadening of sensitivities,* through *conveyance of an incorrect picture of the world,* to *a lowering of values and standards* and, finally, to *undesirable behavior such as sexual perversion, drug addiction or delinquency.*

The target audience: These effects are considered with regard to a variety of social groups, ranging from the normal adult to the susceptible and undesirably predisposed child.

censure and dislike, who offends against the fashion and opinion of the company he keeps, and would recommend himself to. Nor is there one of ten thousand, who is stiff and insensible enough, to bear up under the constant dislike and condemnation of his own club. He must be of a strange and unusual constitution, who can content himself to live in constant disgrace and disrepute with his own particular society. Solitude many men have sought, and been reconciled to: but nobody that has the least thought or sense of a man about him, can live in society under the constant dislike and ill opinion of his familiars, and those he converses with. This is a burden too heavy for human sufferance: and he must be made up of irreconcileable contradictions, who can take pleasure in company, and yet be insensible of contempt and disgrace from his companions.

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The arbiter: legally, a judge or jury are considered qualified to appraise a publication with respect to its content and potential effect. In addition experts in various disciplines of the human sciences have been heard in efforts to decide on such questions. Several privately organized groups, such as the N.O.D.L. [National Organization for Decent Literature], e.g., have relied on the judgment of a small group of interested adults.

It is, indeed, not surprising that the assumptions made by various people on the impact of "bad" books are often inconsistent with each other, unprecise and confusing. Psychological research concerned with other matters has amply demonstrated that judgments become less and less reliable, the more complex an issue is. Even in judging quite simple stimuli, individual variations occur. When there is ample scope for subjective considerations to enter into the judgment, as in the case at hand, agreement between various judges may be very slight.

Most of the sources and authorities quoted so far have relied on their personal psychological insights without raising the question of the reliability of their own judgments; hardly any have based their arguments on available research. * * *

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(Pp. 22-23):

Studies of delinquency have long pointed to the fact that important as personality predispositions are, they must coincide with other conditions in the environment in order to lead to delinquent behavior, which has a

MONTESQUIEU

The Spirit of Laws

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 38, pp. 90, 138).

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[Book XII. Of the Laws That Form Political Liberty, In Relation To The Subject].

13. *Of Writings.* In writings there is something more permanent than in words, but when they are in no way preparative to high treason they cannot amount to that charge.

And yet Augustus and Tiberius subjected satirical writers to the same punishment as for having violated the law of *maiestas*. Augustus, because of some libels that had been written against persons of the first quality; Tiberius, because of those which he suspected to have been written against himself. Nothing was more fatal to Roman liberty. Cremutius Cordus was accused of having called Cassius in his annals the last of the Romans.

Satirical writings are hardly known in despotic governments, where dejection of mind on the one hand, and ignorance on the other, afford neither abilities nor will to write. In democracies they are not hindered, for the very same reason which causes them to be prohibited in monarchies; being generally levelled against men of power and authority, they flatter the malignancy of the people, who are the governing party. In monarchies they are forbidden, but rather as a subject of civil animadversion than as a capital crime. They may amuse the general malevolence, please the malcontents, diminish the envy against public employments, give the people patience to suffer, and make them laugh at their sufferings.

But no government is so averse to satirical writings as the aristocratic. There the magistrates are petty sovereigns, but not great enough to despise affronts. If in a monarchy a satirical stroke is designed against the prince, he is placed on such an eminence that it does not reach him; but an aristocratic lord is pierced to the very heart. Hence the decemvirs, who formed an aristocracy, punished satirical writings with death.

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[Book XIX. Of Laws in Relation to the Principles Which Form the General Spirit, Morals, and Customs of a Nation].

We have said that the laws were the particular and precise institutions of a legislator, and manners and customs the institutions of a nation in general. Hence it follows that when these manners and customs are to be changed, it ought not to be done by laws; this would have too much the air of tyranny: it would be better to change them by introducing other manners and other customs.

Thus when a prince would make great alterations in his kingdom, he should reform by law what is established by law, and change by custom what is settled by custom; for it is very bad policy to change by law what ought to be changed by custom.

The law which obliged the Muscovites to cut off their beards and to shorten their clothes, and the rigour with which Peter I made them crop, even to their knees, the long cloaks of those who entered into the cities, were instances of tyranny. There are means that may be made use of to prevent crimes; these are punishments: there are those for changing our customs: these are examples.

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need and attention of the reader. With regard to this self-selection of books, and in particular of the focus of attention, there is surely "neither good nor bad, but thinking makes it so."

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(P. 44):

* * * There is a large overlap in content matter between all media of mass communication. The daily press, television, movies, radio and fictional printed material all present their share of so-called "bad" material, varying in the degree of reality attached to these matters. It is virtually impossible to isolate the impact of one of these media on a population that is exposed to all of them. Some evidence suggests that the particular communications to which an individual exposes himself are probably in good part a matter of choice. The reader does not take in everything that is offered but mostly what he is predisposed to take. In the realm of attitudes, this means that adult people prefer to expose themselves to material which expresses attitudes they already hold. A conversation of attitudes by any of the mass media is indeed a rare event, if it occurs at all. Apparently, information is much more readily absorbed from the mass media than are attitudes which do not agree with those of the reader.

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EDWARD GIBBON

The Decline and Fall of the Roman Empire

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 40, p. 291).

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But the counsels of princes are more frequently influenced by views of temporal advantage than by considerations of abstract and speculative truth. The partial and increasing favour of Constantine may naturally be referred to the esteem which he entertained for the moral character of the Christians, and to a persuasion that the propagation of the Gospel would inculcate the practice of private and public virtue. Whatever latitude an absolute monarch may assume in his own conduct, whatever indulgence he may claim for his own passions, it is undoubtedly his interest that all his subjects should respect the natural and civil obligations of society. But the operation of the wisest laws is imperfect and precarious. They seldom inspire virtue, they cannot always restrain vice. Their power is insufficient to prohibit all that they condemn, nor can they always punish the actions which they prohibit. The legislators of antiquity had summoned to their aid the powers of education and of opinion. But every principle which had once maintained the vigour and purity of Rome and Sparta was long since extinguished in a declining and despotic empire.

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JOHN STUART MILL

On Liberty

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 43, pp. 272-3).

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. . . This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reason, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.

THEODORE SCHROEDER

"Obscene" Literature and Constitutional Law
(1911) pp. 236-237.

PSYCHOLOGIC TENDENCY AS CRITERION OF GUILT.

Historically considered, an inseparable part of the contention for a larger, or an unabridged, liberty of speech and of the press was the condemnation of that practise in the prosecution for libels which made the guilt of the accused depend upon "the evils which may be imaginatively and prospectively attributed to the influence of his opinions." The opposition to this uncertainty in the criteria of guilt was not limited to persons who believed in unabridged freedom of speech, but was often very forcibly urged by those who desired only a little or no enlargement of intellectual opportunity. Even Blackstone believed that the criteria of guilt for heresy and seditious utterances should be made more certain.

The protest against the uncertainty of the tests of criminality in prosecutions for seditious and blasphemous utterances was upon two distinct grounds. The first and most general of these was the historical retrospect, and was an appeal to expediency. The argument ran thus: Books once condemned for their supposed evil tendencies are now believed to have been good and useful. In making the psychologic tendency of an utterance the test of its criminality, we are again opening the door for a repetition of such error. Therefore, such criminal laws are inexpedient and should be abolished. The second reason for objecting to the tendency-test in penalized utterances

No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, *or* mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.

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was from the point of view of that larger demand for liberty which was founded upon the idea that no freeman should be deprived of his liberty except by *lawful* judgment of his peers, or by the *law* of the land. This was predicated upon the conception that every man should in justice be forewarned that his act is penalized. It could not be the law of the land if it did not impart that advance information, and could not accomplish this except an exact statement of the criteria of guilt was a part of every criminal statute. By such means the lovers of Liberty hoped to obtain *freedom under law* in contradistinction to a mere liberty by permission under lawless despotism. To such persons, it was self-evident that a speculative opinion about the psychologic tendency of an utterance upon a future, undescribed, hypothetical, reader, or hearer, when used as a criterion of guilt, could be no restraint upon the moral idiosyncrasies, stupid bigotry, unreasoned hysterical apprehension, personal interest, or even the superstitious malice, of those charged with the duty of determining whether or not a verbal crime had been committed. It was seen that under such circumstances guilt must be determined by *ex post facto* standards, personal to the individuals passing judgment. This, it was argued, was government according to the lawless despotism of man, and the friends of freedom demanded as one of the conditions without which there could be no liberty of speech or press, or liberty of any sort, that the criteria of guilt be so certain that every man should know in advance, from the very letter of the law, by what

APPENDIX C.

The Impossibility of Identification of "Obscene" or "Indecent" Books and the Thoughts and Desires Which Such Books Stimulate.

WILLIAM JAMES

The Principles of Psychology

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 53, pp. 151-152).

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For there it is obvious and palpable that our state of mind is never precisely the same. Every thought we have of a given fact is, strictly speaking, unique, and only bears a resemblance of kind with our other thoughts of the same fact. When the identical fact recurs, we *must* think of it in a fresh manner, see it under a somewhat different angle, apprehend it in different relations from those in which it last appeared. And the thought by which we cognize it is the thought of it-in-those-relations, a thought suffused with the consciousness of all that dim context. Often we are ourselves struck at the strange differences in our successive views of the same thing. We wonder how we ever could have opined as we did last month about a certain matter. We have outgrown the possibility of that state of mind, we know not how. From one year to another we see things in new lights. What was unreal has grown real, and what was exciting is insipid. The friends we used to care the world for are shrunken to shadows; the women, once so divine, the stars, the woods, and the waters, how now so dull and

standard his conduct would be adjudged criminal. It goes without saying that so long as an *ex post facto* judicial guess as to the psychologic tendency of a speech, book, or picture is the test of guilt, there can be no such thing as *liberty under the law*. Even from those to whom "free speech" meant a limited liberty by permission, there came a protest against tyranny, and the demand for the freedom of every man's opinion from that arbitrary power for the penalizing of words by standards of an *ex post facto* guess or pretense about "the evils which may be imaginatively and prospectively attributed to the influence of his opinions."

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common! the young girls that brought an aura of infinity, at present hardly distinguishable existences; the pictures so empty; and as for the books, what *was* there to find so mysteriously significant in Goethe, or in John Mill so full of weight? Instead of all this, more zestful than ever is the work, the work; and fuller and deeper the import of common duties and of common goods.

But what here strikes us so forcibly on the flagrant scale exists on every scale, down to the imperceptible transition from one hour's outlook to that of the next. Experience is remoulding us every moment, and our mental reaction on every given thing is really a resultant of our experience of the whole world up to that date.

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APPENDIX D.

The Societal Values in Freedom of Speech and Press.

JOHN MILTON

Areopagitica

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 32, pp. 389-390, 399).

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. . . To the pure, all things are pure; not only meats and drinks, but all kind of knowledge whether of good or evil; the knowledge cannot defile, nor consequently the books, if the will and conscience be not defiled.

For books are as meats and viands are; some of good, some of evil substance; and yet God, in that unapocryphal vision, said without exception, Rise, Peter, kill and eat, leaving the choice to each man's discretion. Wholesome meats to a vitiated stomach differ little or nothing from unwholesome; and best books to a naughty mind are not unappliable to occasions of evil. Bad meats will scarce breed good nourishment in the healthiest concoction; but herein the difference is of bad books, that they to a discreet and judicious reader serve in many respects to discover, to confute, to forewarn, and to illustrate. Whereof what better witness can ye expect I should produce, than one of your own now sitting in Parliament, the chief of learned men reputed in this land, Mr. Selden; whose volume of natural and national laws proves, not only by great authorities brought together, but by exquisite reasons and theorems almost mathematically demonstrative, that all opinions, yea errors, known, read, and collated, are of main service and assistance toward the speedy attainment of what is truest. I conceive, therefore, that when God did enlarge the universal diet of man's body, saving ever the rules of temperance, He then also, as before, left arbitrary the dieting and repasting of our minds; as

SIGMUND FREUD

New Introductory Lectures on Psycho-Analysis
(from *A General Introduction to Psycho-Analysis*, p. 449).

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 54, p. 839).

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When you think of this dividing up of the personality into ego, super-ego, and id, you must not imagine sharp dividing lines such as are artificially drawn in the field of political geography. We cannot do justice to the characteristics of the mind by means of linear contours, such as occur in a drawing or in a primitive painting, but we need rather the areas of colour shading off into one another that are to be found in modern pictures. After we have made our separations, we must allow what we have separated to merge again. Do not judge too harshly of a first attempt at picturing a thing so elusive as the human mind. It is very probable that the extent of these differentiations varies very greatly from person to person; it is possible that their function itself may vary, and that they may at times undergo a process of involution.

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wherein every mature man might have to exercise his own leading capacity.

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Truth and understanding are not such wares as to be monopolised and traded in by tickets and statutes and standards. We must not think to make a staple commodity of all the knowledge in the land, to mark and licence it like our broadcloth and our woolpacks. What is it but a servitude like that imposed by the Philistines, not to be allowed the sharpening of our own axes and coulters, but we must repair from all quarters to twenty licensing forges? Had anyone written and divulged erroneous things and scandalous to honest life, misusing and forfeiting the esteem had of his reason among men, if after conviction this only censure were adjudged him that he should never henceforth write but what were first examined by an appointed officer, whose hand should be annexed to pass his credit for him that now he might be safely read; it could not be apprehended less than a disgraceful punishment. Whence to include the whole Nation, and those that never yet thus offended, under such a diffident and suspectful prohibition, may plainly be understood what a disparagement it is. So much the more, whenas debtors and delinquents may walk abroad without a keeper, but unoffensive books must not stir forth without a visible jailer in their title.

Nor is it to the common people less than a reproach; for if we be so jealous over them, as that we dare not trust them with an English pamphlet, what do we but censure them for a giddy, vicious, and ungrounded people; in such a sick and weak state of faith and discretion, as to be able to take nothing down but through the pipe of a licenser?

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WESTON LA BARRE

Obscenity: An Anthropological Appraisal

(in Law and Contemporary Problems, Vol. 20, 1955, Published by School of Law, Duke University, pp. 539-542).

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In the matter of nudity of the body or of body-parts in females, our male-dominated society is, perhaps understandably, ambivalent. Characteristically, in the case of a "living statute" display at the Chicago World's Fair, the law, with sensitive fidelity to the mores, decided that the exposure of both breasts was "obscene," but that the exposure of only one was "art," thus satisfying both church-goers and art-connoisseurs. Two decades ago, it was still being argued whether, with safety to public morals, the male torso might be exposed above the waist on bathing beaches; but for some centuries in our society, the ultimate obscenity has been the display of male genitals, or even their representation in painting and sculpture. Many Malayan and southeast Asiatic peoples are even more rigorous in this respect and do not permit the exposure of male nudity even before other males. The intensity of this repression is shown by the powerful projective sanction of the "evil eye" in which seeing the person does damage to him. But it is impossible to maintain that the total nudity in males of all ages among such people as the Nilotic Nuer can ever have any implication of obscenity to the Nuer themselves. . . . The total nudity of one sex but not the other is, of course, a commonplace in ethnological accounts, as is also nudity at one age but not another, or nudity of some status-group but not another, or in one social or religious context but not another. . . .

The total or partial nudity of the female body is quite as much a commonplace among peoples of the world. It may be didactically useful, perhaps, to emphasize the atypicality in obscenity-sense of our own tribe: In far and away the majority of peoples of the world and on all continents, the exposure of the breast in nursing a child is quite without any connotation of obscenity whatever, nor is permanent exposure above the waist in women. Indeed, in ancient India, uncovering the breasts was a sign of deference to men on the part of lower-caste women and a sign of respect to superiors. That such modesty-sense regarding the breasts is almost wholly European is indicated by the Marotse practice of covering the bosom with a mantle when a strange European approaches, though ordinarily this mantle is worn across the back; such behavior is a direct and clear artefact of European missionary attitudes.

Also, it is quite plain that modesty sense by no means always pertains to the genitalia. The famous story is told by Sir Richard Burton of a Moslem woman in Africa who accidentally fell off a camel. Her skirts were around her head, but her husband regarded the contretemps with equanimity. It was no matter that other men knew that his wife was female—for had she not kept her face covered? Curiously, among the Touareg, it is the men who are veiled and do not expose the face, even before other men in eating. A Haida Indian woman is embarrassed to be caught by a strange man without her labret or lower lip plug. Among many Negro groups in Africa, pro-

priety requires the buttocks to be covered, not the genitals. Philippine Islanders and Samoans think it indecent for the navel to be exposed, though every other part may go uncovered. In China, it is an obscenity for a woman to expose her artificially deformed feet to a strange man. Foot modesty is probably a very ancient Asiatic pattern, for it is found also among the Siberian Koryak, and an Eskimo woman in her igloo may be stripped down to a tiny Bikini skin garment before strange men if only she keeps her boots on, since removal of the boots has a sexual connotation. Among the Canary Islanders, a people isolated perhaps from Neolithic to early modern times, it was immodest for a woman to expose her breasts or feet. The Koryak regard it as deeply sinful to look upon the face of a dead person. Ainu women cover the mouth when speaking to a man. Some of the body parts involved with modesty seem strange indeed. Rameses III (1198-1167 B. C.) boasted in one of his inscriptions that his rule was so successful that he had made it possible for an Egyptian woman to go anywhere she liked *with her ears exposed,* and no stranger would molest her. The Japanese have erotized the nape of a woman's neck.

With respect to obscene or publicly prohibited *acts,* there is the same lack of universality in what we happen to regard as obscenity. We have already seen that public coitus, repeatedly attested to in firsthand accounts, is by no means unknown in Oceania, though normative ethicists would make this perhaps the very first of obscenities "universally" abhorred by all peoples of the world. Nor

among physiological acts is it only coitus that is obscene in public contexts. In some cases, *eating* is an obscene act when performed in the presence of other people or in public; and the same Tahitians who copulated in public would eat separately and privately. The Maldive Islanders ate always in solitude, retiring for this purpose to the innermost part of the house and covering the windows lest passersby observe them; the practice is reported for other Oceanic peoples as well. Many of the "divine kings" in Africa and elsewhere, collected by Sir James G. Frazer in a volume of *The Golden Bough,* never ate in public; perhaps some of the same reasons are involved in the fact that the Pope never dines in public, nor does an American admiral on his flagship.

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ALBERT ELLIS, Ph.D.

The Folklore of Sex

(1951) pp. 138-139, 142-143.

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Besides Broadway and Hollywood productions, other kinds of shows also make lavish use of lasciviousness. Night-club acts, for instance, are notoriously sexier than almost any other kind of performance. Beauty pageants, county fairs, business exhibitions, circuses, and numerous other kinds of shows also make excellent use of lasciviously displayed feminine charms and racy humor. *Picture Show*, illustratively, contains an article entitled "Should the New World's Fair Sell Sex?" This article frankly tells how the last World's Fair at New York was so sparsely populated during its first year that "it was almost possible to shoot deer and bear on the grounds, so scarce were humans. Then somebody had an inspiration for the second year, a brain storm that acted like adrenalin on worried bondholders: put in girls, and invite Broadway producers like Mike Todd, George Jessel, and famed Billy Rose to do their stuff. From then on, things hummed at the box office as Gypsy Rose Lee, Rosita Royce, the natating and extremely beautiful Eleanor Holm did their stuff for the suddenly interested crowds."

In addition we have the never-ending herculean labors of American advertisers to sell everything from chewing gum to sex books with the most inviting palaver and pictures imaginable. If the average American male never read a story, saw a play or a movie, nor listened to a radio or television show, he would still be so overwhelmed by sexiness in newspaper, magazine, transportation, billboard,

and other ads that his daily sex temperature would still tend to rise many degrees every time he viewed a good copywriter's handiwork.

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Having sufficiently belabored the point that examples of lasciviousness are rampant in American fiction, non-fiction, movies, plays, advertisements, and humor, what may we conclude? Clearly that the diatribes against lust, lewdness, and lasciviousness which heavily stud the religious writings of today are having little or no overt effect on the sensuous attitudes and actions of millions upon millions of American citizens. Inwardly, it may well be imagined, these anti-lascivious attitudes of a highly vocal minority are having an appreciable effect: since the fact that our countrymen are so *overly* eager to participate in lusty enjoyments of all types raises the suspicion that they find special adventure and excitement in them which are born of their forbidden-fruit nature.

That is to say, if moralists did not fret and fume about directly expressed sex desire and participation, it is doubtful if the sexuality indirectly expressed in the widespread patronizing of pin-up photos, risqué stories, sex-tinged gadgets, et cetera, would be a fraction as popular as it obviously is today. Sexual lasciviousness seems to be at least partly a function of sexual anti-lasciviousness, and most normal men who carry the seeds of the latter concomitantly reap the crops of the former.

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variety of causal conditions, not a single one. In its most general form this insight obtained here has been formulated as a general psychological law by Kurt Lewin: Behavior is always a function of both personality and environment. Though we have demonstrated that the personality predispositions to crime can hardly be created by reading matter, it remains to be seen whether reading matter forms a significant part of the environmental conditions which, together with a certain personality, leads to crime.

Again, in the literature on the environmental conditions related to delinquency, the impact of bad books is only rarely mentioned if at all. Rather there are in the focus of research matters such as economic deprivation, disturbing personal experiences such as are often the result of broken homes, harsh and severe parents as well as over-protective parents, the influence of juvenile gangs, etc.

The emphasis on such direct experiences as they are shaped by environmental conditions is, again, not accidental. Implied in such findings is a broader principle: *direct experiences have a much greater directive power on human behavior than do vicarious experiences.* Evidence for the operation of this principle comes from a wide range of areas in human conduct.

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(P. 30):

As we now proceed to examine the nature of the experience that results from reading fiction, it must be kept in mind that much the same experience—and perhaps on a more intensive level—is provided by newspaper accounts in "human-interest" stories where the reality character of the event is clearly perceived; and by radio, movies and television which put lesser demands both on the skills and the imagination of the audience.

The first question which arises: who reads what? can hardly be answered specifically without much more research, and research focused on content matter and forms of presentation rather than on different media and on broad classifications such as fiction, biography, mysteries, etc. On a less specific level, however, there is converging evidence from a variety of sources for this answer: people read what they like, or, in other words, what fits their predispositions, personalities and interests.

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(P. 32):

To the extent that this principle of self-selection operates in the choice of reading matter, personality factors discussed in a previous section must be assumed to enter into the impact of books. In other words, what a reader gets out of a book is largely determined by what he brings to it. It is well known that, on occasion, dictionaries, encyclopedias and other neutral material can supply what "bad" books are said to supply, because of the selective

MACAULAY

Critical and Historical Essays

(1843, Vol. III, p. 256)

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We cannot wish that any work or class of works which has exercised a great influence on the human mind, and which illustrates the character of an important epoch in letters, politics and morals, should disappear from the world. If we err in this matter, we err with the gravest men and bodies of men in the empire, and especially with the Church of England and with the great schools of learning which are connected with her. The whole liberal education of our countrymen is conducted on the principle that no book which is valuable, either by reason of the excellence of its style or by reason of the light which it throws on the history, polity and manners of nations, should be withheld from the student on account of its impurity. The Athenian Comedies, in which there are scarcely a hundred lines together without some passage of which Rochester would have been ashamed, have been reprinted at the Pitt Press and the Clarendon Press under the direction of Syndics and delegates appointed by the Universities, and have been illustrated with notes by reverend, very reverend and right reverend commentators. Every year the most distinguished young men in the kingdom are examined by bishops and professors of divinity on the *Lysistrata* of Aristophanes and the *Sixth Satire* of Juvenal. There is certainly something a little ludicrous in the idea of a conclave of venerable fathers of the Church rewarding a lad for his intimate acquaintance with writings compared with which the loosest tale in Prior is modest.

But, for our own part, we have no doubt that the great societies which direct the education of the English gentry have herein judged wisely. It is unquestionable that an extensive acquaintance with ancient literature enlarges and enriches the mind. It is unquestionable that a man, whose mind has been thus enlarged and enriched, is likely to be far more useful to the State and to the Church than one who is unskilled, or little skilled, in classical learning. On the other hand, we find it difficult to believe that, in a world so full of temptation as this, any gentleman, whose life would have been virtuous if he had not read Aristophanes and Juvenal, will be made vicious by reading them. A man who, exposed to all the influences of such a state of society as that in which we live, is yet afraid of exposing himself to the influences of a few Greek or Latin verses, acts, we think, much like the felon who begged the sheriffs to let him have an umbrella held over his head from the door to Newgate to the gallows because it was a drizzling morning and he was apt to take cold. The virtue which the world wants is a healthful virtue, not a valetudinarian virtue—a virtue which can expose itself to the risks inseparable from all spirited exertion—not a virtue which keeps out of the common air for fear of infection and eschews the common food as too stimulating. It would be indeed absurd to attempt to keep men from acquiring those qualifications which fit them to play their part in life with honour to themselves and advantage to their country, for the sake of preserving a delicacy which cannot be preserved—a

delicacy which a walk from Westminster to the Temple is sufficient to destroy.

But we should be justly chargeable with gross inconsistency if, while we defend the policy which invites the youth of our country to study such writers as Theocritus and Catullus, we were to set up a cry against a new edition of *The Country Wife* or *The Way of the World*. The immoral English writers of the seventeenth century are indeed much less excusable than those of Greece and Rome. But the worst English writings of the seventeenth century are decent compared with much that has been bequeathed to us by Greece and Rome. Plato, we have little doubt, was a much better man than Sir George Etherege. But Plato has written things at which Sir George Etherege would have shuddered. Buckhurst and Sedley, even in those wild orgies at the Cock in Bow Street, for which they were pelted by the rabble and fined by the Court of King's Bench, would never have dared to hold such discourse as passed between Socrates and Phaedrus on that fine summer day under the plane-tree. . . .

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JOHN STUART MILL

On Liberty

(in Great Books of the Western World, published by Encyclopaedia Britannica, Vol. 43, pp. 284, 322).

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But when we turn to subjects infinitely more complicated, to morals, religion, politics, social relations, and the business of life, three-fourths of the arguments for every disputed opinion consist in dispelling the appearances which favour some opinion different from it. The greatest orator, save one, of antiquity, has left it on record that he always studied his adversary's case with as great, if not still greater, intensity than even his own. What Cicero practiced as the means of forensic success requires to be imitated by all who study any subject in order to arrive at the truth. He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion. The rational position for him would be suspension of judgment. and unless he contents himself with that, he is either led by authority, or adopts, like the generality of the world, the side to which he feels most inclination. Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost

for them. He must know them in their most plausible and persuasive form; he must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of; else he will never really possess himself of the portion of truth which meets and removes that difficulty.

Ninety-nine in a hundred of what are called educated men are in this condition; even of those who can argue fluently for their opinions. Their conclusion may be true, but it might be false for anything they know: they have never thrown themselves into the mental position of those who think differently from them, and considered what such persons may have to say; and consequently they do not, in any proper sense of the word, know the doctrine which they themselves profess.

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The worth of a State, in the long run, is the worth of the individuals composing it; and a State which postpones the interests of *their* mental expansion and elevation to a little more of administrative skill, or of that semblance of it which practice gives, in the details of business; a State which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes—will find that with small men no great thing can really be accomplished; and that the perfection of machinery to which it has sacrificed everything will in the end avail it nothing, for want of the vital power which, in order that the machine might work more smoothly, it has preferred to banish.

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MADISON'S REPORT ON THE VIRGINIA RESOLUTIONS
House of Delagates, Session of 1790-1800

(In Elliot's Debates in the Several State Conventions on the Adoption of the Federal Constitution, published by J. B. Lippincott Company, 1907, pp. 569, 570, 571.)

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The freedom of the press, under the common law, is, in the defences of the Sedition Act, made to consist in an exemption from all previous restraint on printed publications, by persons authorized to inspect or prohibit them. It appears to the committee that this idea of the freedom of the press can never be admitted to be the American idea of it; since a law inflicting penalties on printed publications would have a similar effect with a law authorizing a previous restraint on them. It would seem a mockery to say that no laws should be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made.

The essential difference between the British government and the American constitutions will place this subject in the clearest light.

In the British government, the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate. The representatives of the people in the legislature are not only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger

from the executive. Hence it is a principle, that the Parliament is unlimited in its power; or, in their own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people,—such as their Magna Charta, their bill of rights, &c.,—are not reared against the Parliament, but against the royal prerogative. They are merely legislative precautions against executive usurpation. Under such a government as this, an exemption of the press from previous restraint by licensers appointed by the king, is all the freedom that can be secured to it.

In the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt, not only from previous restraint of the executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws.

The state of the press, therefore, under the common law, cannot, in this point of view, be the standard of its freedom in the United States.

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The last remark will not be understood as claiming for the state governments an immunity greater than they have heretofore enjoyed. Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press. It has accordingly been decided, by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits. And can the wisdom of this policy be doubted by any one who reflects that to the press alone, checkered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflects that to the same beneficent source the United States owe much of the lights which conducted them to the rank of a free and independent nation and which have improved their political system into a shape so auspicious to their happiness?

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THOMAS JEFFERSON

A Bill for Establishing Religious Freedom

(in The Works of Thomas Jefferson, Federal Edition, Vol. II, pp. 438-441).

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SECTION I. Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet choose not to propagate it by coercions on either, as was in his Almighty power to do, but to exalt it by its influence on reason alone; that the impious presumption of legislature and ruler, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time: That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that

even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness; and is withdrawing from the ministry those temporary rewards; which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind; that our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; and therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust or emolument, unless he profess or renounce this or that religious opinion, is depriving him injudiciously of those privileges and advantages to which, in common with his fellow-citizens, he has a natural right; that it tends also to corrupt the principles of that very religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed these are criminals who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; that the opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous falacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or suffer from his

own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.

SECT. II. We the General Assembly of Virginia do enact that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, or shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

SECT. III. And though we well know that this Assembly, elected by the people for their ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operations, such act will be an infringement of natural right.